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In the

Supreme Court of the United States

October Term, 1931

No. 15

Interstate Commerce Commission
Petitioner

v.

The New York, New Haven and Hartford Railroad Company, Old Colony Railroad Company, Boston and Providence Railroad Corporation (Massachusetts), Boston and Providence Railroad Corporation (Rhode Island), Providence, Warren and Bristol Railroad Company, Harlem River and Port Chester Railroad Company, Holyoke and Westfield Railroad Company, Providence and Worcester Railroad Company, Chatham Railroad Company, and Norwich and Worcester Railroad Company,
Respondents

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In the

Supreme Court of the United States.

OCTOBER TERM, 1931

No. 773

INTERSTATE COMMERCE COMMISSION,

PETITIONER

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, OLD COLONY RAILROAD COMPANY, BOSTON AND PROVIDENCE RAILROAD CORPORATION (MASSACHUSETTS), BOSTON AND PROVIDENCE RAILROAD CORPORATION (RHODE ISLAND), PROVIDENCE, WARREN AND BRISTOL RAILROAD COMPANY, HARLEM RIVER AND PORT CHESTER RAILROAD COMPANY, HOLYOKE AND WESTFIELD RAILROAD COMPANY, PROVIDENCE AND WORCESTER RAILROAD COMPANY, CHATHAM RAILROAD COMPANY AND NORWICH AND WORCESTER RAILROAD COMPANY,

RESPONDENTS

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS

Reference to Opinions Delivered in the Courts Below and Statement of Grounds on Which the Jurisdiction of this Court is Invoked

On April 18, 1932 this Court granted a petition by the Interstate Commerce Commission for a writ of certiorari to

review a judgment of the Court of Appeals of the District of Columbia entered on January 18, 1932 reversing a judgment of the Supreme Court of the District of Columbia entered on April 3, 1931 dismissing a petition by The New York, New Haven and Hartford Railroad Company and other controlled or leased railroad companies together owning an interstate railroad line located in New York, Connecticut, Rhode Island and Massachusetts filed on July 3, 1930 for a writ of mandamus to compel the Commission in making its final valuation of the property owned or used by those railroad companies to investigate, ascertain and report the value of their rights in the passenger terminal known as the Grand Central Terminal in New York City and the approaching tracks from Woodlawn to Forty-third Street and in the passenger terminal known as the South Station in Boston.

The memorandum opinion of the Supreme Court of the District of Columbia is unreported, but appears on pages 434-449 of the record. The opinion of the Court of Appeals of the District of Columbia is reported in 60 App. D. C. 403 and 55 Fed. (2nd) 1028 and appears on pages 641-655 of the record. The Report of the Commission on the final valuation of the property is reported in I. C. C. Val. Rep. Vol. 30, 1 and appears on pages 24-388 of the record.

Jurisdiction is invoked under subsection (a) of Section 240 of the Judicial Code as amended and reenacted by Act of February 13, 1925 (c. 229, 43 Stat. 936, 938).

Statement of the Case

The Proceedings before the Commission

By Act of Congress on March 1, 1913 commonly known as the Valuation Act, which appears as Section 19a of the Interstate Commerce Act, the Interstate Commerce Commission (hereinafter referred to as the Commission) was directed to investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the

provisions of the Act. Shortly thereafter the Commission entered upon an investigation, known as Valuation Docket No. 311, to ascertain the value as of June 30, 1915, of the property owned or used by the respondent railroad companies, all of which are controlled by or leased to The New York, New Haven and Hartford Railroad Company and together own an interstate railroad line through New York, Connecticut, Rhode Island, and Massachusetts operated as the New York, New Haven and Hartford system (hereinafter sometimes collectively referred to as the Carrier). On or about December 2, 1922, the Commission, having completed its investigation, published and served upon the Carrier a copy of its tentative valuation. The Carrier duly filed its protest against the failure of the Commission to ascertain and report the value of its rights in the tracks of the New York and Harlem Railroad Company (hereinafter referred to as the Harlem) from Woodlawn to Forty-third Street and in the passenger terminal known as the Grand Central Terminal in New York City and in the passenger terminal known as the South Station in Boston. Hearings on the protest were held before an examiner of the Commission at which testimony and documentary evidence was introduced by the Carrier in support of its protest. The issues were submitted to the Commission on May 18, 1926.

The Property Rights in Issue

The following is a brief history of the Carrier's rights in the tracks and terminals in question, according to the undisputed documentary evidence as set forth in narrative form in the respondents' bill of exceptions before the Court of Appeals of the District of Columbia (Record, p. 455 ff.).

1. The New York and Harlem Railroad Company was incorporated by the legislature of New York in 1831 and constructed its railroad from White Plains to New York City. The New York and New Haven Railroad Company,

predecessor of The New York, New Haven and Hartford Railroad Company, was incorporated by the legislature of Connecticut in 1844, under a perpetual charter (Exhibit 2, Record, p. 495). After constructing its railroad from New Haven to the New York state line it applied to the New York legislature for authority to extend its railroad into New York City, but the authority was not granted (Record, pp. 457, 458). Thereafter, as a result of negotiations between the Harlem and the New Haven they entered into an agreement dated March 17, 1848, whereby the Harlem granted to the New Haven the right to run its trains over the Harlem's tracks into New York City in accordance with operating arrangements determined by the officers of both companies (Record, p. 460, and Exhibit 7, Record, p. 520). These rights were granted in perpetuity because the agreement was to continue in force "during the terms of their charters respectively and for all renewals thereof." Twelve days later the legislature of New York, by act of March 29, 1848, amended the Harlem's charter by authorizing the New Haven to run its trains over the Harlem's tracks upon such terms as had been or might be agreed upon by and between the two companies, a copy of the agreement to be authenticated and filed in the office of the secretary of state (Record, p. 462, and Exhibit 8, Record p. 529). The above-mentioned agreement was duly authenticated and filed in the office of the secretary of state, as provided in the act (Record, p. 463). The New Haven has enjoyed and exercised the rights so granted from that day to this. On April 1, 1873, the Harlem leased its railroad to the New York Central and Hudson River Railroad Company (hereinafter referred to as the Central) for a term of four hundred and one years, but by paragraph Ninth the lease was made expressly subject to the rights of the New Haven under the agreement (Record, p. 465, and Exhibit 11, Record, p. 559). The Carrier claimed that under the agreement it had a perpetual easement in the railroad of the Harlem from

Woodlawn to Forty-third Street, and that, by virtue of the statute subjecting the Harlem's charter to the dominant rights of the New Haven upon the authentication and filing of the agreement in conformity therewith, the easement acquired the added advantages of a franchise.

2. The original terminal of the Harlem at Canal Street was moved north to Twenty-seventh Street in 1857, and further north to Forty-second Street in 1872. On November 1, 1872, the Harlem, the Central and the New Haven entered into a tripartite lease whereby the Harlem was to construct the original Grand Central Depot at Forty-second Street and lease it to the Central and the New Haven for the joint use and occupancy of all three companies (Record, p. 464). Following the passage of an Act of May 7, 1903, requiring the substitution of electricity for steam as a method of operation in Park Avenue, the three railroad companies entered into a further agreement dated July 24, 1907, providing for the construction of the present Grand Central Terminal and its approaches as far north as Fifty-ninth Street (Record, p. 470, and Exhibit 13, Record, p. 593). By paragraph 3 of the agreement the Central acting for itself and the Harlem demised, let and leased to the New Haven the use, in common with the Central, of the terminal, provided the use should not exceed 50% of its maximum capacity, and as compensation for the premises thereby demised the New Haven was to pay interest on the cost of construction and a proportion of the annual expenses for maintenance and operation. Paragraph 12 provided that the terminal should be under the sole charge and direction of a terminal manager appointed by the presidents of the Central and the New Haven and removable at any time upon written notice by either of them. Paragraph 25 provided that the covenants and agreements should remain in force during the term of the demise which by paragraph 3 was to continue "during the term of the New Haven Company's charter and all renewals thereof," and therefore in perpetuity. The

Carrier claimed that this agreement gave it the perpetual possession and enjoyment of one undivided half of the terminal property, and that, as the agreement could be terminated only for non-payment of rent or upon the termination of its charter, neither of which events was within the control of the Harlem or the Central, it had an estate in base fee.

3. By act of June 9, 1896, the legislature of Massachusetts incorporated The Boston Terminal Company with power to construct and maintain a union passenger station for the five railroad companies mentioned in the act, including four of the respondents herein, each of which was authorized to subscribe for 20% of its capital stock (Record, p. 477, and Exhibit 16, Record, p. 615). Section 9 required all the railroad companies to use the station when completed instead of their existing terminals and invested the Supreme Judicial Court with jurisdiction to enforce that provision. The act directed the railroad companies to pay to the terminal company the amounts necessary to pay the expenses of its corporate administration and of the maintenance and operation of the station, interest on its bonds, and a dividend of 4% on its capital stock, all in proportion to their respective use of the property. Section 25 provided that the terminal company should pay a franchise tax to Massachusetts upon its capital stock, but that its real estate required by the act to be used by the railroad companies should be assessed to the railroad companies each of which should be deemed an "owner" of the real estate in proportion to its use thereof. At the time of the valuation investigation the proportion of use as between the New Haven affiliates and the Central, as lessee of the Boston and Albany Railroad, was 75% by the former and 25% by the latter. The Carrier claimed that its statutory right and obligation to use the terminal property, together with the other provisions of the act, gave it a perpetual easement therein.

The Final Valuation.

In its evidence before the Commission the Carrier placed on its property rights in the tracks from Woodlawn to Forty-third Street and in the Grand Central Terminal a value of $55,490,531 and on its property rights in The Boston Terminal Company property a value of $17,802,000. (Record, pp. 61 and 67.) The exercise of its rights in these properties is necessary in the Carrier's operations, it could not abandon those operations without the approval of the Commission and its tariffs on file with the Commission cover operations over those properties. On or about January 14, 1930, the Commission made public and served on the Carrier its report and order dated November 13, 1929, purporting to fix the final valuation of its property. The portions of the report relating to the tracks and terminals in question appeared under the headings "Terminal Property at New York City" and "The Boston Terminal Company" (Record, pp. 60, 67). Although the Commission found the rights of the Carrier in the tracks and terminals to be "valuable and essential to the operation of its property as a whole," "a valuable asset," it refused to ascertain and report any value for those rights, on the ground that they were not entitled to be valued "for rate-making purposes." As to the tracks from Woodlawn to Forty-third Street, the report stated (Record, p. 64):

> "In our finding of value of the property owned or used in common carrier service for rate-making purposes, we are of the opinion that no specific sum should be found for the carrier's right to use these tracks. It is therefore not necessary for us to determine whether the right of use in the carrier is best defined by reference to it as a license to use, an easement or a trackage right. We do recognize that the advantages to the carrier of these rights are valuable and essential to the operation of its property as a whole. Nevertheless, for

> the purpose of finding a rate base, it is distinguished only by its magnitude from the many other similar rights of carriers to the joint use of property wholly owned by other carriers."

As to the joint use of the Grand Central Terminal, it stated (Record, p. 66):

> "The right to use these extensive terminal facilities is a commercially valuable contract right owned by the carrier, and this joint use thereof is also a valuable asset to the owning company. But for the purpose of ascertaining the value, for rate-making purposes, of the carrier's property owned or used in common carrier service, no specific value will be reported for the right of the carrier to the use of this property."

The Proceedings in Court

On July 3, 1930, the Carrier filed in the Supreme Court of the District of Columbia its petition for a writ of mandamus directing the Commission, in the performance of its statutory duty, to ascertain and report the value of its rights in the tracks and terminals in question. The Commission answered that it had ascertained the value of the physical property, but not of the incorporeal rights of the Carrier therein, and had reported the entire value of the tracks from Woodlawn to Forty-third Street and of the Grand Central Terminal in the inventory of the Central, as exclusive operating lessee of the Harlem, and the entire value of the South Station in the inventory of The Boston Terminal Company. The pleadings and evidence showed that the action of the Commission in confining itself to the valuation of the physical property was in accordance with a rule which it had adopted for its own convenience and administration. The report on the valuation of the Carrier made express reference to Appendix 3 of its report on *Texas Midland Railroad,* 75 I. C. C. 1, for a statement of

the methods of valuation employed (Record, p. 127). The applicable extracts from Appendix 3 were annexed to the petition, and laid down the broad rule that, where one carrier had a joint right to use property of another carrier, the physical property would be valued as a whole to the latter, or to its exclusive operating lessee, and that no part of the value of the property would be assigned to the right of the first carrier to use it.

The case was heard before Mr. Chief Justice Wheat of the Supreme Court of the District of Columbia on February 12, 1931. On April 1, 1931, he handed down a "Memorandum Opinion," concluding that the Commission did not err in declining to value the New Haven's rights (Record, p. 434). His conclusion was based upon the practical difficulties inherent in undertaking to place a value on the many and varying rights of one carrier to use the property of another and that the Carrier's rights were no different in kind from the ordinary trackage and terminal rights resulting from contract arrangements between carriers. On April 3, 1931 judgment was entered dismissing the petition and the Carrier noted an appeal.

The appeal was argued before the Court of Appeals of the District of Columbia which, on January 18, 1932, handed down its unanimous opinion written by Associate Justice Van Orsdel reversing the judgment of the Supreme Court of the District of Columbia and ordering a writ of mandamus in accordance with the petition (Record, p. 641). The court decided that under the agreement of March 17, 1848, the New Haven had a perpetual easement in the railroad of the Harlem and that the act of March 29, 1848, amending the Harlem's charter, subjected the Harlem's railroad to a dominant servitude in favor of the New Haven constituting a perpetual franchise; that under the agreement of July 24, 1907, the New Haven had a base fee in an undivided half of the Grand Central Terminal; and that under the act of June 9, 1896, the New Haven acquired an

ownership and perpetual right of use in the property of The Boston Terminal Company; that all of the foregoing rights were "property" owned and used by the Carrier and accordingly entitled to valuation under Section 19a; that the Commission had no power to limit its valuation to a value "for rate-making purposes" or in so doing to exclude such rights from valuation; and that the failure of the Commission to ascertain and report the value of those rights was a breach of duty for which mandamus was the proper remedy.

The Commission filed in this Court on March 7, 1932 a petition for a writ of certiorari to review the judgment of the Court of Appeals of the District of Columbia and certiorari was granted on April 18, 1932.

Statutes

The relevant parts of the Valuation Act of March 1, 1913, (c. 92, 37 Stat. 701), being Section 19a of the Interstate Commerce Act, as amended in certain respects on June 7, 1922 (c. 210, 42 Stat. 624) and of Section 15a, added to the Interstate Commerce Act by the Transportation Act of February 28, 1920 (c. 91, 41 Stat. 456, 488), are set out in an appendix to this brief.

Summary of Argument

I

The Carrier acquired a perpetual easement in the railroad of the Harlem from Woodlawn to Forty-third Street under the agreement of March 17, 1848, the agreement creating more than a mere license or so-called "trackage right". The agreement took on the added advantages of a franchise when the legislature of New York by the act of March 29, 1848 amended the Harlem's charter by subjecting it to the obligation of the agreement as a dominant servitude.

The perpetual right to use one undivided half of the Grand Central Terminal which the Carrier acquired by the lease of July 24, 1907 was an estate in the property, a base fee in an undivided half thereof, a joint ownership with the Harlem.

By the act of June 9, 1896 the legislature of Massachusetts authorized and required the Carrier and other railroad companies to give up their existing terminals and use the property conveyed to The Boston Terminal Company as a union station, authorized the courts to compel such use and provided that for certain purposes the railroad companies should be deemed the "owners" of the property, thus creating in the Carrier a perpetual easement in the terminal property instead of leaving it a mere stockholder in the terminal company.

The Carrier's rights in the tracks from Woodlawn to Forty-third Street, acquired in 1848, were prior in time and superior in interest to the rights of the Central under its lease of the Harlem's railroad in 1873, and those rights as well as the Carrier's rights in the Grand Central Terminal, both being perpetual estates in the respective properties, will continue after the Central's lease, limited to 401 years, has terminated. Nevertheless the Commission has included the entire value of those properties in the Central's inventory.

II

In so doing the Commission followed the rule it adopted in the *Texas Midland Railroad* valuation, reported on July 31, 1918, that no value will be assigned to the right of one carrier to use property of another carrier irrespective of whether the right of use constitutes a legal estate in the property itself. Congress not having specified in the Valuation Act of March 1, 1913, being Section 19a of the Interstate Commerce Act, the purpose for which the valuations were to be used, the Commission assumed that an inventory of all

entitled to valuation under Section 19a as "property owned or used" by the Carrier. In its Report under the headings "Terminal Property at New York City" (Record, p. 60) and "The Boston Terminal Company" (Record, p. 67) the Commission reviewed the history of the Carrier's rights, but made no finding as to whether they constituted estates in the property or not. The Commission's position was that they were making a valuation "for rate-making purposes" and no value should be assigned to the rights of one carrier to use property of another carrier whatever be the legal status of those rights. The Commission expressly stated:

> "It is therefore unnecessary for us to determine whether the right of use in the carrier is best defined by reference to it as a license to use, an easement or a trackage right."

In the Supreme Court and Court of Appeals of the District of Columbia, however, the Commission for the first time took the position that the Carrier's rights in the tracks and terminals were mere contracts and did not constitute estates in the property. This is a proceeding to compel the Commission to determine the value of those rights as part of the "property owned or used" by the Carrier so that while this Court is not primarily concerned with the precise legal status of the rights involved it is incumbent on the Carrier to satisfy the Court that upon the undisputed documentary evidence the Carrier has important property rights which warrant the exercise of the Court's discretion to order them to be valued.

A. *The title of the Carrier in the tracks from Woodlawn to Forty-third Street*

The New York and Harlem Railroad Company was incorporated by the legislature of New York in 1831 and constructed its railroad from White Plains into New York

City. The New York and New Haven Railroad Company, the predecessor of the New York, New Haven and Hartford Railroad Company, was incorporated by the legislature of Connecticut on June 7, 1844 under a charter which was unlimited in duration. It was thereby empowered to construct its railroad from New Haven to the New York state line. It subsequently applied to the New York legislature for authority to extend its railroad from the state line into New York City, but the authority was not granted. Following earlier negotiations the two companies eventually entered into an agreement dated January 22, 1846 and later in the same year the legislature of New York authorized the New Haven to connect its railroad with that of the Harlem at William's Bridge near Woodlawn, the present connection, and the legislature of Connecticut authorized the New Haven to accept the grant. (Record, pp. 457-458.)

Thereafter the two railroads entered into a substitute agreement dated March 17, 1848 whereby in the following language the Harlem granted to the New Haven the right to run its trains over the Harlem's tracks into New York City.

> "*Fourth.* It is mutually understood and agreed that when and as soon as the New York and New Haven Railroad Company shall have completed their road from the point of junction to Byram River, they shall have the right to run their trains, engines, and cars for the transportation of passengers, mails, expresses, freight, etc., over the track or tracks of the road of the New York and Harlem Railroad Company from the point of junction aforesaid to and into the city of New York and as far over the same in the said City as the said Company's road shall extend, not however below the intersection of said Railroad and Pearl Street in said City,—the said New York and New Haven Company furnishing their own haulage." (Record, p. 460.)

These rights were granted in perpetuity because the new agreement was to continue in force "during the terms of their charters respectively and for all renewals thereof," the charter of the New Haven from the State of Connecticut was of unlimited duration, (Exhibit 2, Record, p. 495), and under the law of New York, where the agreement was to be performed, a charter or franchise for an indefinite term is perpetual. *People* v. *O'Brien,* 111 N. Y. 1. Twelve days later the legislature of New York by act of March 29, 1848 amended the Harlem's charter in the following language:

> "The New York and New Haven railroad company is hereby authorized to enter upon and run their cars and engines for passengers, freights, mails, expresses and other business, over the road of the New York and Harlem railroad company, from the point of junction of the roads of said companies at or near William's Bridge, in the county of Westchester, to the City of New York, and as far into the said city as the said Harlem railroad may extend, upon such terms and to such point as has been or may hereafter be agreed upon by and between said companies; a copy of such agreement or agreements to be duly authenticated and filed in the office of the secretary of state of this state; and to take, transport, and convey persons and property upon the said Harlem Railroad, by the power and force of steam or animals or any mechanical power or combination of the same." (Record p. 462.)

and the new agreement was duly authenticated and filed in the office of the secretary of state as provided in the act. (Record, p. 463.) The Harlem's charter was thus subjected to the dominant rights so granted to the New Haven.

The New Haven and its successors have enjoyed and exercised the rights so granted from that day to this. The subsequent indenture of April 1, 1873 whereby the Harlem leased its railroad property to the Central for a term of

401 years was made expressly subject to the rights of the New Haven under the agreement. (Record, p. 465.) In the later negotiations resulting in the agreement of July 24, 1907 under which the Grand Central Terminal was constructed those rights were considered of such importance by the committees representing the New Haven and the Central, as Mr. Buckland testified, that the New Haven was able to dictate various changes in the plans submitted by the Central and to obtain the perpetual use of one-half of its maximum capacity at a rental based on a proportion of the interest and maintenance charges without paying any part of the cost of construction. (Record, pp. 469 and 475.)

The rights of the New Haven under the agreement of March 17, 1848 had all the characteristics of a perpetual easement in the railroad of the Harlem from the connection at Woodlawn to Forty-third Street. The easement moreover acquired the added advantages of a franchise by virtue of the authentication and filing of the agreement in conformity with the grant of power conferred by the New York legislature amending the charter of the Harlem. The latter's railroad was subjected to a right of way, a dominant tenement recognized by the law as an estate in property.

1. The nature of the interest acquired by the New Haven under the agreement and statute was in issue before the Commission in the valuation proceedings, but instead of performing its duty in that respect the Commission avoided the issue by saying that in finding a value "for rate-making purposes" it was "not necessary for us to determine whether the right of use in the carrier is best defined by reference to it as a license to use, an easement or a trackage right." The Commission now comes before the Court with the contention that the New Haven acquired a mere license or what the Commission is pleased to call a "trackage right." The issue cannot be disposed of by any such generalization. Some "trackage rights" are property, some are

not. If they constitute an easement, as these rights do, they are property. As the court said in *United States* v. *Welch*, 217 U.S. 333 at p. 339:

> "A private right of way is an easement and is land. . . . The same reasoning that allows a recovery for the taking of land by permanent occupation allows it for a right of way taken in the same manner, and the value of the easement cannot be ascertained without reference to the dominant estate to which it was attached."

2. The agreement created an easement, not a mere license. The distinction, according to the law of New York, the place where this agreement was to be performed, is laid down in *Saratoga State Water Corporation* v. *Pratt*, 227 N. Y. 429 at pp. 442, 443:

> "The rights granted the plaintiff were not revocable by and at the will of the state or its representatives. Those rights invested the plaintiff with an interest of some character in the lands of the reservation. This much is manifest. A license is revocable and carries no interest in the land in or over which it is to be enjoyed. It may become irrevocable through the expenditure of money by the licensee and, when executed, will prevent the owner of the land from maintaining an action of trespass for the acts done under it. The rights of the plaintiff here were not temporary, were not revocable and were not devoid of an interest in the land. . . . Incorporeal real property is defined to be a right issuing out of or annexed to a thing corporeal, and consists of the right to have some part only of the produce or benefit of the corporeal property, or to exercise a right or have an easement or privilege or advantage over or out of it."

By paragraph Fourth of the agreement the New Haven acquired the right to operate its trains over the tracks of the Harlem forever. The compensation provided for in paragraph Sixth was "for the use and occupation of their track or tracks aforesaid." The extent of the use and occupation was unlimited in space except that by paragraph Fifth the express trains of either party were given preference over the local trains of the other party. It was unlimited in time for by paragraph Fourteenth the agreement was to continue in force "during the terms of their charters respectively" and the term of the New Haven's charter was unlimited. (Exhibit 7, Record, p. 520.) The New Haven trains were to be operated by and under the control of its own employes and the New Haven was given equal control over the mode of operation for by paragraph Fifth it was to be "adjusted from time to time by the said companies or such officers as they may respectively appoint or designate to make such arrangements for running their several trains". The agreement could not have been a license for it was not revocable by either party.

The Commission contends that the New Haven does not pay for an estate, but only for the use of the tracks and that as it was under no obligation to use the tracks it was not required to pay anything. The merit of this argument lies solely in the ingenious way it is stated. An easement or lease is none the less an estate in property because the rent is based on some contingency such as the extent of the use. A common form of rent especially in mining leases is a royalty based on output. In dealing with another great railroad working out plans for a permanent entrance into New York City the Harlem may well have considered it unnecessary to ask for any minimum guaranty and the continued use of those tracks during the ensuing eighty years reflects credit on the Harlem's judgment. In any event, whether or not the New Haven was obligated to use the tracks in no way qualifies its right to use them.

The agreement is on all fours with one which this Court has held to be an easement. In *Joy* v. *St. Louis*, 138 U. S. 1, two railroad companies and the park commissioners of St. Louis entered into an agreement whereby the former acquired a right of way through a park. That agreement provided in paragraph Ninth:

> "Said party of the second part (one of the railroad companies) shall permit, under such reasonable regulations and terms as may be agreed upon, other railroads to use its right of way through the park and up to the terminus of its road in the City of St. Louis upon such terms and for such fair and equitable compensation to be paid to it therefor as may be agreed upon by such companies."

The property was sold at foreclosure and thereafter another railroad company applied for permission to use the right of way. The question was whether the agreement created a mere personal obligation on the part of the two railroad companies which would have been destroyed by the foreclosure sale or an estate in the property to which the sale would have been subject. In holding that it was an estate in the property the Court said at p. 38:

> "The covenant in paragraph 9 of the tripartite agreement created an easement in the property of the County company and the Kansas City Company for the benefit of the public, which might be availed of, with the consent of the public authorities, properly expressed, by other railroad companies which might wish to use not only the right of way through the park but also that between the park and the Union Depot."

and further at p. 39:

> "That agreement created the easement before referred to, which covered the tracks through the park and the tracks east of the park to the Union Depot."

In *Louisville & Nashville Railroad Company* v. *Chesapeake & Ohio Railroad Company*, 107 Ky. 191, the Louisville & Nashville Railroad Company entered into a written agreement with certain other railroad companies granting them the right for 100 years to use in common with it a certain part of its right of way at a monthly rental based on a proportion of the maintenance charges on a wheelage basis, each company operating its own trains. The court said at p. 196:

> "For all practical purposes, this contract may be regarded as one by which the Louisville & Nashville Company sold to the second parties a joint interest in its roadway . . . the latter paying, in lieu of purchase price, a rental equal to one-half of the interest at six per cent. per annum on the value of the entire track, bridges, structures, etc. . . . But, whether we look at the transaction in this way or not, the second parties did become the joint owners of the use of the road for the term of 100 years."

The Commission relies for its proposition that the agreement created merely "trackage rights", whatever legal significance that expression may have, on the authority of *Union Pacific Railway Company* v. *Chicago, Rock Island and Pacific Railway Company*, 163 U. S. 564, but that case is readily distinguishable. The Union Pacific Railway Company granted to four other railroad companies the right to use certain tracks of the former. The contracts were similar in form so the court dealt with the contract with the Chicago, Rock Island and Pacific Railway Company. The Pacific Company "lets the Rock Island Company into the full, equal and joint possession and use of its main and passing tracks" between certain points for 999 years. "Schedules of rules and regulations" for the movements of trains were to be made by officers of the lessor and lessee subject to the decision of referees in case of disagreement,

but "all trains" were to be "moved under the immediate direction of the superintendent or other officer of the lessor company". The Pacific Company might admit any other company to the joint use and possession of the same tracks provided such additional burden did not interfere with the Rock Island Company. Following a change in management of the Pacific Company it repudiated the contract and undertook forcibly to prevent the Rock Island Company from using the tracks. Thereupon the Rock Island Company brought a bill in equity for specific performance of the contract and the Pacific Company answered that the contract was ultra vires because as a railroad corporation it had no power to disable itself by contract from the full performance of its public duties.

In upholding the contract the court relied primarily upon the provision for operating the trains under the direction of an officer of the lessor, saying at page 582:

> "The contract provided that the Pacific Company hereby 'lets the Rock Island Company into the full, equal and joint possession and use of its main and passing tracks.' The possession here spoken of was such possession as the Rock Island Company would have when its engines, cars and trains were running over the tracks. The company had no possession before its trains came on the tracks or after they had run off of them, and while its trains were on the tracks its possession was only of the particular part occupied temporarily while running over them. *Moreover, all trains were to be moved under the direction of an officer of the Pacific Company. The Rock Island trains coming upon a Pacific track immediately passed from the control of the Rock Island Company into that of the Pacific, and its officials were subjected to the orders of the Pacific's officers.* And throughout the whole contract there does not appear to be a single provision

> which looks to any actual possession by the Rock Island of any of the Pacific property beyond that which was involved in its trains being run over the tracks under the direction of the other company. The contract in this regard was really an agreement for trackage rights, for running arrangements, a 'terminal contract' with compensation on a 'mileage' or 'wheelage basis,' rather than a lease." (Italics ours.)

In that vital respect the contract differed from the New Haven-Harlem agreement of March 17, 1848. When the New Haven's trains come on the tracks at Woodlawn they do not pass into the control of the Harlem or of its present lessee, the Central. They are operated and controlled by the New Haven in accordance with such operating arrangements as may be determined by the officers of both companies under paragraph Fifth. Moreover the "second line of rails" was to be constructed by the Harlem "in a manner approved by the chief engineers of both roads". Thus the New Haven was given a limited control over both the property and its operation. The possession of the New Haven, unlike that of the Rock Island, is not subordinate to, but rather coextensive with, that of the Harlem for each may absorb the use of the entire tracks subject only to the preference awarded the express trains of each over the local trains of the other.

The *Union Pacific* case presented the property question only incidentally. The court was dealing with the broad question of whether the contract as a whole was one which involved a surrender of the exercise of its franchises by a railroad corporation enjoying grants from the federal government rather than any technical question of property rights. That the decision turned on the point that the Pacific Company controlled the operation of the trains is manifest from the dissenting opinion of Mr. Justice Shiras for he considered the contract ultra vires because he differed

from the majority in his interpretation of the provision that the trains should be "moved under the direction of an officer of the Pacific Company," his view being that those directions had to be in accordance with the schedules adopted by the officers of both companies, just what paragraph Fifth of the New Haven-Harlem agreement expressly provides. His language at page 605 is impressive:

> "The legal effect of these contracts is to create a *joint ownership,* for 999 years, of an important portion of the Union Pacific's railroad and appurtenances, 'a full, equal and joint possession of its tracks,' and a subjection to rules and regulations prescribed by the duly authorized officers of the lessor and lessee companies, and, in case of disagreement, subjection to the decision of referees, mutually appointed, invested with power to prescribe schedules, rules and regulations, and to modify existing ones." (Italics ours.)

and again at page 608:

> "The plain meaning, as I think, of these contracts is that the Union Pacific Railway Company has thereby parted with its sole and absolute control of those portions of its road and tracks that are embraced within the scope of the contracts, and with the sole and absolute power to exercise its franchises to occupy, possess and operate such portions of its road, and has agreed to participate, for a period of 999 years, with other railway companies, in the full, joint and equal possession of those portions of its road, in their physical aspect, and to confer upon such other companies the right to join, on equal terms, in the making of all rules and regulations pertaining to the use and management thereof."

It is not an unwarranted inference that the majority of the Court might have felt the same way had it not been for their

interpretation of the provision for control of operation by the lessor, a provision which the New Haven-Harlem agreement does not contain.

3. The act amending the charter of the Harlem added to the agreement upon its being authenticated and filed thereunder the advantages of a franchise. In *Owensboro* v. *Cumberland Telephone & Telegraph Company,* 230 U. S. 58 at p. 65 the Court said of a city ordinance granting the company the right to erect and maintain telephone poles on the streets:

> "That an ordinance granting the right to place and maintain upon the streets of a city poles and wires of such a company is the granting of a property right, has been too many times decided by this court to need more than a reference to some of the later cases . . . As a property right it was assignable, taxable and alienable. Generally it is an asset of great value to such utility companies and a principal basis for credit."

The act did not in terms amend the original act of 1831 under which the Harlem was incorporated, but it did in terms amend one of the succeeding acts relating to the Harlem, all of which constituted amendments to the Harlem's charter under the reserved power to "alter, amend, modify or repeal this Act." It was entitled

> "An Act to Amend an Act Entitled 'An Act Relating to the New York and Harlem Railroad Company passed May 7th, 1840' and the Acts Amending the Same." (Exhibit 8, Record, p. 529.)

The point is that it took the form of an amendment to the prior acts defining the powers of the Harlem instead of an amendment to the prior acts defining the powers of the New Haven, thus manifesting an intention on the part of the legislature to subject the railroad of the Harlem to the

Harlem under the agreement and the State of New York under the statute. The easement was subject to the future contingency that the State of Connecticut under the reserve power of alteration, amendment or repeal might terminate the New Haven's charter but the State of Connecticut was not one of the grantors. The grantors, the Harlem and the State of New York respectively, could not terminate the easement since the agreement was not revocable by the Harlem nor was the franchise revocable by the State of New York for although the latter could terminate the Harlem's charter it could not terminate a franchise granted thereunder to another corporation. *People* v. *O'Brien*, 111 N. Y. 1. Therefore the perpetual easement created by the agreement and statute was an easement in base fee, the equivalent of a joint ownership in perpetuity.

This perpetual easement and franchise was acquired by the New Haven twenty-five years before the Central first acquired its entrance into New York City along those tracks. The Central's lease terminates at the expiration of 401 years from April 1, 1873, but the New Haven will still have the right to operate its trains along those tracks under the original agreement. The mere statement of this proposition demonstrates the inconsistency of the position of the Commission in valuing this entire property to the Central which as a mere lessee for a term of years has no freehold estate therein and whose lease thereof contains an express provision subjecting it to the prior and superior rights of the New Haven.

5. Recognition of the New Haven's property interest in the tracks from Woodlawn to Forty-third Street is found in the act of May 7, 1903 providing for the substitution of electricity for steam as a mode of operation in Park Avenue. (Record, p. 468.) The act first directed the Harlem and its lessee, the Central, to depress all the existing tracks. By section 4 the Harlem, the Central

". . . and The New York, New Haven & Hartford

> Railroad Company, so long as it has any contract or other rights to operate its trains in Park Avenue south of the Harlem River . . . are hereby authorized to run their trains by electricity."

Section 8 provided:

> "Nothing in this act contained shall have the effect of limiting or impairing in any manner or to any extent the existing rights, privileges or franchises of the railroad corporations, or either of them, now using the said tunnel . . . and the said railroad corporations, or either of them, are hereby authorized and empowered to acquire by purchase or by condemnation . . . all property . . . which may be necessary . . . in order to carry out and into effect the provisions of this act."

The only two corporations using the tunnel were the Central, operating the railroad of the Harlem under the lease, and the New Haven, operating its own trains under the agreement of March 7, 1848. The act amounted to a legislative recognition that the New Haven had "rights, privileges and franchises" in Park Avenue and conferred on it the power of eminent domain.

B. *The title of the Carrier in the Grand Central Terminal*

On November 1, 1872 the Harlem, the Central and the New Haven entered into a tripartite lease whereby the Harlem was to construct the original Grand Central Depot at Forty-second Street and lease it to the Central and the New Haven for the joint use and occupation of all three companies, (Record, p. 464), and by section 1 thereof the rights of the New Haven were to continue during the term of its charter, which, as already shown, was perpetual. In its lease of the railroad of the Harlem dated April 1, 1873 the Central expressly covenanted to perform all the obligations imposed on the Harlem under the tripartite lease. (Record, p. 466.)

Following the passage of the act of May 7, 1903 requiring the substitution within five years of electricity for steam as a method of operation in Park Avenue the three railroad companies, the New York, New Haven & Hartford having succeeded the New York and New Haven, entered into a further agreement dated July 24, 1907 providing for the construction of the present Grand Central Terminal and covering the operation of the approaches as far north as Fifty-ninth Street. (Record, p. 470). Paragraph 3 provided:

> "The Central Company, acting for itself and the Harlem Company, as hereinafter authorized, in consideration of the rents hereinafter reserved to be paid by the New Haven Company, and in consideration of the covenants on the part of the New Haven Company hereinafter contained, hath demised, let and leased, and by these presents doth demise, let and lease unto the New Haven Company, during the term of the New Haven Company's charter and all renewals thereof, including the charter of any company which shall operate the present railroad of the said New Haven Company, the use in common with the Central Company, subject to all the provisions of this agreement of the said Railroad Terminal for the accommodation of the traffic of the New Haven Company, other than freight traffic, provided, however, that the New Haven Company's right to the use thereof shall in no event exceed fifty (50) per centum of the maximum capacity of said Railroad Terminal or of any part thereof."

and "as compensation for the premises hereby demised" the New Haven was to pay interest on the cost of construction and a proportion of the annual expenses for maintenance and operation.

Paragraph 1 defined the Railroad Terminal with precision. The definition was applied to the plan introduced in evidence (Exhibit 15) by Mr. Buckland in his testimony be-

fore the Supreme Court of the District of Columbia. (Record, p. 475.) By paragraph 2 the Central agreed to construct the terminal. By paragraph 6 the New Haven covenanted "not to assign this lease or any interests therein, or any interest in or to the use of the said Railroad Terminal hereby demised, or to underlet the same or any part thereof without the previous written consent of the Central Company." In the same paragraph it was provided that upon the New Haven's default continued for sixty days "it shall be lawful for" the Central "to enter into and upon said premises and repossess itself thereof." By paragraph 8 the Central covenanted and agreed "that the New Haven Company, paying the rent and sums of money hereinbefore mentioned and performing the covenants and agreements aforesaid on its part to be performed, shall and may at all times during the term hereby granted, peaceably have, hold and enjoy the premises herein demised to it, without any manner of trouble or hindrance of or from the Central Company or any one claiming under it." Paragraph 12 provided that

> "the Railroad Terminal . . . shall be under the sole charge and direction of a Terminal manager, who shall be appointed in writing by the presidents of the Central and New Haven companies, and shall be removable at any time upon written notice by either of said presidents."

Paragraph 25 provided that the covenants and agreements should remain in force during the term of the demise which by paragraph 3 was to continue

> "during the term of the New Haven Company's charter and all renewals thereof, including the charter of any company which shall operate the present railroad of the said New Haven Company."

1. The fact that in paragraph 3 the thing demised was "the use . . . of said terminal" did not restrict the lessee's

rights to those of a licensee. A demise of the use of property is a demise of the property itself. This demise gave the New Haven an estate in the terminal property. In *Georgia* v. *Cincinnati Southern Railway*, 248 U. S. 26, the State of Georgia made the following grant:

> "There is hereby granted to the Trustees of the Cincinnati Southern Railway, for the use of said railway, *the use* of that portion of the *right-of-way* of the Western and Atlantic Railroad between [certain points] provided always, that this grant is subject to the consent and approval of the lessees of the Western and Atlantic Railroad as to the term of their lease." (Italics ours.)

This act contained no provision for alteration, amendment or repeal. Thereafter the state by statute undertook to repeal the act on the ground that it granted "a license only, that the State was free to revoke." After the passage of the repealing act, the state brought a bill in the United States Supreme Court seeking to enjoin the Cincinnati Southern Railway "from longer occupying or using any portion of the right of way of the Western and Atlantic Railroad; a railroad built and owned by the plaintiff State." In dismissing the bill on the ground that the act granted a right of way in fee to the defendants which could not be revoked, Mr. Justice Holmes said at p. 28:

> "*A grant of the use of a right of way is the grant of a right of way in the ordinary meaning of words,* and a grant of a right of way to a corporation or to perpetual trustees holding for the corporate uses does not need words of succession to be perpetual. The words 'and its successors' or 'in fee' would not enlarge the content of a grant to a corporation." (Italics ours.)

The Commission seeks to distinguish that case on the ground that there was a grant of a portion of the right of way, the land itself. To be sure this Court held that the grantee ac-

quired an interest in the land itself, but the language of the instrument was no stronger than that in the agreement of July 24, 1907, namely, "the use" of a portion of the right of way. The decision is direct authority for the interpretation of the corresponding language in the agreement of July 24, 1907 as a grant of an interest in the Grand Central Terminal itself. That such is the proper interpretation of this agreement in accordance with "the ordinary meaning of the words" is demonstrated by the provisions of paragraph 6 permitting the Central "to enter into and upon said premises and repossess itself thereof" upon the New Haven's default and the provisions of paragraph 8 by which the Central covenants and agrees "that the New Haven Company, paying the rent and sums of money hereinbefore mentioned and performing the covenants and agreements aforesaid on its part to be performed, shall and may at all times during the term hereby granted, peaceably have, hold and enjoy the premises herein demised to it, without any manner of trouble or hindrance of or from the Central Company or any one claiming under it." The New Haven was given the possession and enjoyment of an undivided half of the terminal property.

2. The use was to continue "during the term of the New Haven Company's charter and all renewals thereof, including the charter of any company which shall operate the present railroad of the said New Haven Company." The New Haven's charter from the State of Connecticut was perpetual. A right to the possession and enjoyment of premises in perpetuity is the equivalent of ownership. In *Wells* v. *Savannah,* 181 U. S. 531 an instrument read in part: "The said conditional estates shall amount to this, that *the use* and occupation *of the premises* are forever secured to the purchaser and others claiming under him or her on payment of the ground rent" (Italics ours) and reserved to the grantor a right of re-entry for non-payment of rent. In holding that this language conferred upon the grantee the ownership

thereof, subject to the right of re-entry, and not a mere leasehold, the court specifically approved at page 544 the following language of the state court:

> "The value of property consists in its use, and he who owns the use forever, though it be on condition subsequent is the true owner of the property for the time being."

In *Loomis* v. *Heublein*, 91 Conn. 146 in an amicable suit to settle title the instrument read: "For myself my heirs and assigns, I lease to" the grantee "his heirs and assigns, the exclusive *rights to use* and have the water of the spring in my pasture . . . and *to use*" a described strip of land "so long as he pays me a rent of Twenty Five ($25) Dollars a year in advance and allows plenty of water for the creatures to drink which may be pastured in the lot" with certain reservations for domestic uses. (Italics ours.) The plaintiff claimed that the estate granted was a mere leasehold either from year to year or for an indefinite period terminable by either party at the end of any year. The defendant claimed that it was a base or determinable fee. In upholding the defendant's contention the court said at pages 150-151:

> "The use and enjoyment of the premises by the lessee and his heirs and assigns is, therefore, to be perpetual, limited upon the non-payment of the rent. A deed which conveys the absolute possession and enjoyment of land to a person, his heirs and assigns forever, without limitation, conveys an estate in fee simple. One which conveys the possession and use to a person so long as he makes certain annual payments, or so long as a certain river runs, or tree stands, conveys a qualified or determinable fee."

Upon the authority of the above decisions, and by the terms of the instrument itself, the demise to the New Haven of the

use of one-half of the Railroad Terminal was a grant of an estate therein.

3. The termination of this estate was not within the power of either of the grantors, the Harlem or the Central. It could terminate only upon the New Haven's default in payment of rent or upon the termination of the New Haven's charter by the State of Connecticut and the termination of the charter of any other company which might thereafter operate the railroad. The termination of the New Haven's charter and the charters of such other companies were events which might or might not happen. The estate was to continue until the happening of one of several events which were not within the control of the grantors and might never happen. Such an estate is a base fee. In *Proprietors of Locks and Canals* v. *Boston & Maine Railroad,* 245 Mass. 52, the facts were identical in all pertinent respects with those here presented. In that case there was a lease to a railroad company during its continuance or until the Commonwealth purchased the railroad, a power it had reserved to itself in the charter, or until default in the payment of rent. In the case at bar the lease is to a railroad company during its charter or the charter of any company operating its present railroad or until default in the payment of rent. In each case the grant is to continue until the state chartering the grantee shall do a certain act wholly beyond the control of the grantor or until there is a default in the payment of rent. In that case it was held that the railroad company had a base fee in the property. In construing this instrument the court said at p. 56:

> "The habendum clause shows that the leases are for an indefinite term. They are to continue until the happening of one of several events and then to cease. The crucial event may happen at any time, or it may never happen. The leases, therefore, may never come to an end. The effect of the words used was to convey a base fee."

Similarly the New Haven has a base fee in an undivided half of the Railroad Terminal. To the same effect see: *Owensboro* v. *Cumberland Telephone and Telegraph Company,* 230 U. S. 58; *J. W. Perry* v. *Norfolk,* 220 U. S. 472; *Georgia* v. *Cincinnati Southern Railway,* 248 U. S. 26; *Jamaica Pond Aqueduct Corporation* v. *Chandler,* 9 Allen (Mass.) 159, 168; *Kavanaugh* v. *Cohoes Power & Light Corporation,* 187 N. Y. S. 216; *Piper* v. *Meredith,* 139 Atl. (N.H.) 294; *Ocean Grove Camp Meeting* v. *Reeves,* 79 N. J. L. 334; *Cincinnati College* v. *Yeatman,* 30 Ohio St. 276; *Penick* v. *Atkinson,* 139 Ga. 649; *Connecticut Spiritualist Camp Meeting Association* v. *East Lyme,* 54 Conn. 152.

No words of inheritance are necessary to convey a fee to a corporation. *Georgia* v. *Cincinnati Southern Railway,* 248 U. S. 26. Since 1863 no words of inheritance are necessary to convey a fee even to an individual in New York. New York Statutes at large 1863, Part II, Title 5, §1, now McKinney's New York Consolidated Laws, Book 49, §240; *Kavanaugh* v. *Cohoes Power & Light Corporation,* 187 N. Y. S. 216.

C. *The title of the Carrier in the South Station*

By Act of June 9, 1896 the legislature of Massachusetts incorporated The Boston Terminal Company

> "with power to construct and maintain a union passenger station in the southerly part of the city of Boston, and to provide and operate adequate terminal facilities for the several railroad companies hereinafter authorized to hold the stock of said terminal company, and for the accommodation of the public in connection therewith." (Record, p. 477.)

Section 2 fixed the capital stock of the terminal company at $500,000, authorized each of the following railroad companies to subscribe for 20% of the stock: (1) Boston and

Albany Railroad Company, (2) New England Railroad Company, (3) Boston and Providence Railroad Corporation, (4) Old Colony Railroad Company and (5) The New York, New Haven and Hartford Railroad Company, being lessee of Old Colony Railroad Company, and provided that the stock must be "paid in cash by said railroad companies" before the terminal company began the taking of lands for the site of the new station to be constructed. Section 3 vested the management of the station and its approaches in a board of five trustees, one to be appointed by each of the railroad companies from its board of directors. Section 9 provided:

> "All said railroad companies upon the completion of said station shall use the same, and the terminal facilities provided by said terminal company on the land hereinabove authorized to be taken for all of their terminal passenger business in Boston, instead of the passenger terminals now used by them, and the Supreme Judicial Court, or any justice thereof, shall have jurisdiction in equity to enforce this provision."

Section 10 provided:

> "Said railroad companies hereby required to use said union station shall pay to the terminal company for such use, in monthly payments, such amounts as may be necessary to pay the expenses of its corporate administration and of the maintenance and operation of said station, and of the facilities connected therewith and owned by said terminal company, including insurance and all repairs, all taxes and assessments which may be required to be paid by said terminal company, the interest upon its bonds or other obligations issued under the provisions of this act as the same shall become payable, and a dividend, not to exceed four per cent. per annum upon its capital stock. Each of said railroad companies shall pay for such use of said sta-

> tion and facilities in the proportion in which it has the use thereof."

and that the proportion of use of the several railroad companies should be fixed from time to time by agreement between them, or in case they fail to agree, by the Massachusetts board of railroad commissioners and that the payments made by each of the railroad companies to the terminal company under this section "shall be deemed a part of their operating expenses" and vested the Supreme Judicial Court with jurisdiction to compel the making of such payments. Section 25 provided:

> "The terminal company shall pay a franchise tax to the Commonwealth upon the true market value of its capital stock, without any deduction, whatever, but its real estate required by this act to be used by said railroad companies shall be assessed to and the taxes thereon shall be paid by said railroad companies, and in the assessment of franchise taxes upon said railroad companies each of them shall be deemed to be the owner of said real estate in the proportion in which it then has the use thereof under this act."

Pursuant to this act The Boston Terminal Company was incorporated, each of the five railroad companies subscribed for 20% of its capital stock, and the terminal, known and herein referred to as the South Station, and its approaches were constructed. The New York, New Haven and Hartford has acquired the railroad of New England Railroad Company and leased the railroads of Boston and Providence Railroad Corporation and Old Colony Railroad Company. The New York Central Railroad Company has leased the railroad of the Boston and Albany Railroad Company. The proportion of use as between the New Haven and the Central as of the valuation date was 75% by the former and 25% by the latter.

From the above statement it appears that the interest of the New Haven in the South Station and its approaches is not that of a mere stockholder in the terminal company. Upon the completion of the terminal facilities the act granted to the New Haven *the right to use* a certain proportion thereof, and, indeed, *required* the New Haven *to exercise that right* for all of its terminal passenger business in Boston. This grant was unlimited in duration and therefore perpetual. The grant of such a perpetual right to use property constitutes an estate in the property itself for the reasons and under the decisions already set forth. *Owensboro* v. *Cumberland Telephone and Telegraph Company,* 230 U. S. 58. *Georgia* v. *Cincinnati Southern Railway,* 248 U. S. 26.

The interest of the New Haven in the property was described as "ownership" for certain purposes in section 10 providing that although the terminal company shall pay a franchise tax, the "real estate acquired by this act to be used by said railroad companies shall be assessed to and the taxes thereon shall be paid by said railroad companies and in the assessment of franchise taxes upon said railroad companies each of them shall be deemed to be the owner of said real estate in the proportion in which it then has the use thereof under this act". It is plain from this specific provision and the general tenor of the act that an interest in the property itself was vested in the railroad companies. The situation is analogous to that in *Chicago, Milwaukee & St. Paul Railroad Company* v. *Des Moines Union Railway Company,* 254 U. S. 196. There three railroad companies entered into an agreement for the acquisition of land for the construction of a union terminal, the title to be in a trustee and the railroad companies to share the cost of maintenance and operation in proportion to their respective use of the terminal. Thereafter they organized a terminal company to which they conveyed the land by absolute deeds in exchange for its capital stock. The court held that under

the circumstances they did not intend to treat the terminal company as a separate entity in which they had only the rights of stockholders, but as a trustee of the land for their benefit.

Ownership of the stock as such does not carry with it the right to use the property. Section 2 did authorize the railroad companies to subscribe for the stock, but as mere stockholders they acquired no right to use the property. An entirely distinct section of the act, section 9, authorized and required them to use the new station instead of the stations they were then using and gave the Supreme Judicial Court jurisdiction to make them do so. The Commission proceeds on the theory that as the value of the easement is reflected in the value of the stock it is immaterial whether they assign that value to the New Haven as a property owner or as a stockholder. It does make a great difference to the New Haven. It is doubtful whether capital stock is "railway property held for and used in the service of transportation" within the meaning of the rate-making sections of the Interstate Commerce Act whereas terminal property certainly is. Moreover, the proportions are not the same, for the New Haven, though controlling 80% of the stock, uses only 75% of the property, which demonstrates the fallacy of the argument.

II

The Commission is Not Authorized by Section 19a to Make a Valuation of Physical Property to the Exclusion of Estates and Other Incorporeal Interests Therein

The final valuation fails to place any value on the rights of the Carrier in the tracks from Woodlawn to Forty-third Street, the Grand Central Terminal and The Boston Terminal Company property, not because those rights were not "property," not because they were not valuable, but because upon the rate base which the Commission has seen fit to adopt no value is assigned the rights of one carrier in

physical property constructed or acquired by another carrier subject to those rights. Conceiving its duty under Section 19a to be limited to making a physical valuation of each piece of property owned or used by a carrier, the Commission disregards what it calls "contracts for the use of property" even though those contracts, as here, create a legal estate, an incorporeal hereditament, in the property itself. The Commission cannot thus arbitrarily exclude from valuation such an estate in property. It is "property" and it is "owned" by the carrier and therefore it becomes the duty of the Commission to ascertain and report its value.

The Commission did not purport to ascertain and report the value of all the Carrier's property. It reported something which it designated "value for rate-making purposes." As to the tracks from Woodlawn to Forty-third Street the report states (Record, p. 64):

> "In our finding of value of the property owned or used in common carrier service for rate-making purposes, we are of the opinion that no specific sum should be found for the carrier's right to use these tracks. It is therefore not necessary for us to determine whether the right of use in the carrier is best defined by reference to it as a license to use, an easement or a trackage right. We do recognize that the advantages to the carrier of these rights are valuable and essential to the operation of its property as a whole. Nevertheless, for the purpose of finding a rate base, it is distinguished only by its magnitude from the many other similar rights of carriers to the joint use of property wholly owned by other carriers."

As to the joint use of the Grand Central Terminal it states (Record, p. 66):

> "The right to use these extensive terminal facilities

is a commercially valuable contract right owned by the carrier, and this joint use thereof is also a valuable asset to the owning company. But for the purpose of ascertaining the value, for rate-making purposes, of the carrier's property owned or used in common carrier service, no specific value will be reported for the right of the carrier to the use of this property."

That the Commission was assuming to dictate its own conception of a proper rate base instead of ascertaining and reporting the actual fair value of all the property of the Carrier is apparent upon the face of the report where the Carrier's rights in the tracks from Woodlawn to Forty-third Street are arbitrarily excluded because "for the purpose of finding a rate base" they are "distinguished only by their magnitude from the many other similar rights of carriers to the joint use of property." The Commission makes no effort to place a value on what it admits are rights "valuable and essential to the operation of its property as a whole," "a valuable asset to the owning company." The Commission simply determines that upon its own conception of a proper rate base this "valuable asset" should not be valued.

The so-called Valuation Act, Section 19a of the Interstate Commerce Act, was approved on March 1, 1913. Congress did not indicate for what purpose the valuations were to be used and the Commission itself, as stated in its first valuation report, *Texas Midland Railroad,* 75 I. C. C. 1, 6 decided July 31, 1918, did not know:

"The act does not specify any purpose for which a value is to be found or to which the valuation is to be put, except as it provides that all valuations by the Commission shall be *prima facie* evidence of the value of the property in all proceedings under the act to regulate commerce, in all judicial proceedings for the enforcement of that act, and in judicial proceedings

> brought to enjoin, set aside, annul or suspend, in whole or in part, any order of the Commission."

At that time the Commission was concerned primarily with rate-making, but Section 19a made no reference to that subject. It was not until the Transportation Act approved February 28, 1920, two years after the *Texas Midland Railroad* report, that Congress without making any substantial change in Section 19a nevertheless specified that the valuations thereunder should be used not only in rate-making but also in consolidation, recapture of excess earnings, the division of joint rates, and the issuance of securities.

A. *There is no provision for a special or restricted valuation*

Although the expression "physical valuation" had been discussed at Committee hearings prior to its enactment, Section 19a made no provision for a valuation solely of physical property to the exclusion of estates and other incorporeal interests therein.

Subdivision (a) directs the Commission to

> "investigate, ascertain and report the value of all the property owned or used by every common carrier subject to the provisions of the Act."

Subdivision (b) (First) directs it to ascertain and report in detail as to each piece of property, other than land, owned or used for purposes of common carrier "the original cost to date, the cost of reproduction new, the cost of reproduction less depeciation" and an analysis of the methods adopted. It then directs the Commission to

> "in like manner ascertain and report separately other values, and elements of value, if any, of the property of such common carrier."

with a like analysis of methods. Subdivision (b) (Second) directs it to state the original cost of all lands, rights of way

and terminals owned or used for the purposes of a common carrier and

> "the present value of the same."

Subdivision (c) requires the investigation to show

> "the value of the property of every common carrier"

as a whole and separately by states. Subdivision (i) makes the final valuation *prima facie* evidence

> "of the value of the property."

in all proceedings under the Act and in all judicial proceedings for its enforcement or to enjoin, set aside, annul or suspend orders of the Commission. Throughout these provisions the thing to be ascertained and reported is the "value" of the property. Neither by definition nor implication is there any suggestion that the value should be a special or restricted value, a value for any particular purpose or any different value fom its actual pecuniary and economic value.

Subdivision (b) (Third) requires that the investigation and report shall show separately

> "the property held for purposes other than those of a common carrier, and the original cost and present value of the same."

and the valuation thereof is to be made in the same manner as that of property held for purposes of a common carrier for in (Fourth) the Act proceeds to lay down a general method of valuation to be adopted by the Commission in ascertaining the original cost "of the property of such common carrier". It cannot be supposed that in valuing property held for purposes other than those of a common carrier the Commission was to ascertain and report a different value from that used in commercial transactions yet

the Act requires the valuation of both classes of property without distinction as to method or result.

The only mention of "physical property" appears in the following significant language in Subdivision (a):

> "The Commission shall make an inventory which shall list the *property* of every common carrier . . . in detail, and show the value *thereof* as hereinafter provided, and shall classify the *physical property,* as nearly as practicable, in conformity with the classification of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission." (Italics ours.)

Here in the same sentence Congress distinguishes between "property" and "physical property"—and note what the distinction is. The Commission is to inventory the "property" and show the value *thereof,* the value of all the property owned or used by the carrier and in so doing the "physical property" is to be classified according to the Commission's accounting rules. Had Congress intended the inventory to include only the physical property the sentence would have read "The Commission shall make an inventory of the property and classify it, as nearly as practicable, in conformity, etc." By further providing in the same sentence that the value to be shown in the inventory was to be the value "thereof," referring to the "property" as distinguished from the "physical property" Congress made it only too plain that the inventory was to show two separate things, the *value* of all the property owned or used by the carrier, whether physical or incorporeal, and the *classification* of the physical property. Any special or restricted valuation resulting in the exclusion of all but physical property is an unauthorized departure from the plain meaning of the act. The Commission endeavors to explain this distinction between "property" and "physical property" on the ground that the former refers to such

items of accounting as engineering, supervision, and interest during construction but the explanation is not convincing for the word "property" is in no way descriptive of accounting items.

In final confirmation of its intention to have the valuation represent something more than a mere schedule of the physical properties Congress in Subdivision (b) particularly directed the Commission to

> "ascertain and report separately other values, and elements of value, if any, of the property of such common carrier"

In the adaptability of the location as an entrance into two great communities for railroad purposes lies an "element of value", perhaps the chief element of value of the property. Such adaptability for railroad purposes was referred to by Mr. Justice Hughes in the *Minnesota Rate Cases*, 230 U. S. 352, 451, as "an element to be considered" in determining actual fair value. This element of value in the tracks and terminals does not belong exclusively to the Harlem because the New Haven has a perpetual right to enjoy it in common with others. The Harlem could not convey the exclusive right to enjoy that element of value to anyone else because the conveyance would have to be made subject to the New Haven's perpetual right to enjoy it also. Note for example that in the mortgage of June 1, 1897 securing the Harlem's bond issue paragraph 8 of the granting clause conveyed the property to the trustee "*subject however* to the rights of The New York, New Haven and Hartford Railroad Company in respect to any of said property under a certain agreement bearing date March 17, 1848 . . ." (Record, p. 467.) Upon no sound basis of valuation, therefore, can this element of value be said to belong entirely to the Harlem or to its lessee, the Central. It belongs in part to the New Haven because of its perpetual rights and must be so valued.

B. *The arbitrary rule for the valuation of jointly used property adopted by the Commission in the Texas Midland Railroad report is inconsistent with the statute*

Regardless of the evident intention of Congress that all the property, whether physical or incorporeal, of each carrier be inventoried and valued, the Commission in its very first valuation report, *Texas Midland Railroad,* supra, adopted an arbitrary rule which as applied to cases like this where one carrier has an estate or other incorporeal interest in the physical property of another carrier is in direct conflict with the provisions of Section 19a. The gist of the rule is that where one carrier has a right to use the physical property of another carrier, the entire value of the physical property as a unit is included in the inventory of the so-called "owner" and no value is assigned to the right of use, irrespective of the legal nature or extent thereof, unless the right of use be exclusive in which event the entire value of the physical property as a unit is included in the inventory of the carrier having the exclusive use thereof. The rule may best be stated in the Commission's own language from that report:

> "It often happens that a carrier which owns and uses its property gives to some other carrier a qualified use in that property in common with itself. Such use is generally denominated a trackage right, and is the right to use the tracks of the owner for a compensation usually varying with the extent of the use. Where such an arrangement exists as to property which is of sufficient value to be of significance, the portion in which trackage or similar rights are granted is inventoried by itself and the fact and nature of the use described in the inventories both of the owner and the user.
>
> ". . . It has been the desire of the Commission to appraise all the carrier property operated by carriers subject to its jurisdiction, but to report that property

> but once. When the used column of all carriers covered by this appraisal is totaled, it should give the total reproduction costs of all common-carrier property in the United States without duplication. This can not be done if the claim of the carriers that all property over which a particular carrier operates shall be included as used both by the owner and by the user." (75 I.C.C. 1, Appendix 3, pp. 123, 124.)

Note that while reference to the nature of the rights is made in the inventory of each carrier, the amount, that is to say the valuation, appears only in the inventory of the carrier "owning" the railroad, subject to those rights, or, as in this case, in the inventory of its exclusive lessee.

> "In addition to the use of property owned, many common carriers have made arrangements by contracts for the use of property for common-carrier purposes which is owned by others . . . Where property is owned by a common carrier and is used by it jointly with another carrier or carriers for common-carrier purposes, the property is included in detail in the inventory of the owning carrier and reference is made to the use by the other carrier or carriers. The extent and terms of the use appear also in the inventory of the using carrier or carriers." (75 I. C. C. 1, Decision, pp. 20, 21).

Note again that it is only the "extent and terms of use," not the value, which appears in the inventory of the carrier having the right to use the property. Continuing:

> "In its protest the carrier makes no complaint concerning the property used exclusively by it, but insists that the procedure above outlined is erroneous to the extent that it results in omitting from the inventory the three cost values of property used but not owned by it and the value of its right to use such property." (Decision, p. 21.)

"In addition to its claim that the three cost values of the property used but not owned should be included in its inventory, the carrier asserts that it is our duty to report separately a figure as the value of the right to use. It is a sufficient answer to this contention to state it is now universally accepted that it is the fair value of the property used by the public service corporation in serving the public which is to govern in fixing rates. *San Diego Land Co.* v. *National City,* 174 U. S. 739. This being true, the value of that property can not be increased or diminished by contracts or other arrangements between the carriers themselves. In the absence of an improper payment as rental the public is not concerned with the acts of carriers between themselves. The law requires the ascertainment of values for property owned or used, but not the value of the use." (Decision, pp. 23, 24.)

This very statement of the rule shows that it was necessarily limited to cases where one carrier owned the property and the other carrier had a mere contract for the use of it and had no possible application to cases where the contract created an estate in the property itself, making both carriers joint owners.

Applying this arbitrary rule the Commission has included the entire value of the tracks from Woodlawn to Forty-third Street and of the Grand Central Terminal in the inventory of the Central solely because of the indenture of April 1, 1873, whereby the Harlem leased its railroad to the Central for 401 years. In so doing the Commission has disregarded the fact that that very lease was made subject to the perpetual easement of the New Haven in the tracks of the Harlem from Woodlawn to Forty-third Street created by the agreement of March 17, 1848 and the Central covenanted to perform all the conditions and obligations of the Harlem thereunder. The unfairness and inconsistency of the Commission's position is demonstrated by the fact that

in the tracks from Woodlawn to Forty-third Street the rights of the New Haven are prior and superior to those of the Central and in the Grand Central Terminal the rights of the New Haven, though not prior, are superior to those of the Central. The only interest of the Central in the tracks from Woodlawn to Forty-third Street is by virtue of a lease which terminates at the expiration of 401 years and it was made expressly subject to a pre-existing easement of the New Haven which is perpetual. The only interest of the Central in the Grand Central Terminal is by virtue of an agreement which terminates as to it with said lease but continues as to the New Haven in perpetuity.

The rule is not even consistent with an interpretation of Section 19a as requiring a mere valuation of physical property. If the New Haven had an exclusive lease of the property, that is to say a 100% use of it, even for a short term of years, the Commission would have included the entire value of the tracks and terminals in the inventory of the New Haven, just as it has in fact included that entire value in the inventory of the Central. The distinction therefore is not between the ownership of physical and incorporeal property, but between exclusive and joint use thereof, a purely arbitrary, unfair and unworkable method of valuation for any purpose.

C. *The proper valuation of incorporeal property would not result in duplication*

The Commission purports to be disturbed by the practical difficulties which might arise in undertaking to value the many contracts which carriers have made with each other covering the joint use of tracks or terminals and accordingly has adopted the arbitrary rule that no value will be assigned to the right of use. The Commission says that to value the contracts separately from the physical property would result in duplication and make the aggregate valuation greater than the value of the property.

In this the Commission fails to distinguish between those contracts which create mere contractual rights and those which create estates in the property itself. The Carrier is not placing any academic interpretation on the word "property." It is not using it in the constitutional sense which includes contracts, labor and other individual rights. It is not asking the Commission to value as such the agreements of March 17, 1848 and July 24, 1907. It is using "property" in the same sense as the Commission, namely, the tracks and the terminal, but it contends that those agreements created a property interest, an estate, an incorporeal hereditament, in the tracks and terminal themselves. The Harlem is not the sole owner of that property and neither the Harlem nor its lessee, the Central, is entitled to have the full value of that property included in its inventory. The ownership of the property is subject to the estates therein. The value of those estates should be deducted from the value of the tracks and terminal and assigned to the Carrier. There would then be no duplication.

No doubt, as the Commission says, once they include the entire value of the property in the inventory of some one carrier, to then include the value of the rights of other carriers therein in their own inventories would result in an aggregate valuation greater than the actual value of the property. The error of the Commission is in its hypothesis, not in its conclusion. The duplication results from the insistence of the Commission on valuing a strip of land or a terminal as a whole to one carrier. The *value* should be assigned to and among the several carriers having property rights therein in proportion to their respective interests. This would be in accordance with the ordinary methods of valuation in everyday use. If a tract of land be crossed by a right of way no intelligent appraiser reporting on the value of the fee would give it the same value as though the right of way did not exist. The value of the land would be reduced by the value of the

right of way. The practical application of the rule arises in connection with long-term leases. The lease has no value unless the rental value of the property exceeds the rent reserved, but to the extent that the lease has value the reversion is less valuable because the owner of the reversion must accept the rent reserved instead of being able to obtain the full rental value of the property. In accordance with these principles the Commission should have determined the value of the New Haven's easement in the tracks from Woodlawn to Forty-third Street, assigned that value to the New Haven and the balance to the Harlem or the Central.

From what the Commission said in the *Texas Midland Railroad* report and now reiterates in its brief it may fairly be inferred that its motivating objection is based on the difficulty and inconvenience of making such a proper valuation:

> "To say that the Commission must seek out every instance of that kind, make each of these pieces of track a valuation section, distinguish between those pieces which are used by one carrier in common with the owner, or by several carriers in common with the owner, would be to impose a most intolerable burden and to confuse beyond reason the reports themselves without practical benefit." (Appendix 3, p. 125.)

But it should be unnecessary to point out, as this Court in discussing Section 19a felt constrained to do in *Kansas City Southern Railway Company* v. *Interstate Commerce Commission*, 252 U. S. 178 at 188, hereinafter discussed at length, that

> "Even if it be further conceded that the subject-matter of the valuations in question which the act of Congress expressly directed to be made necessarily opened a wide range of proof and called for the exercise of close scrutiny and of scrupulous analysis in its

> consideration and application, such assumption, we are of opinion, affords no basis for refusing to enforce the act of Congress, or what is equivalent thereto, of exerting the general power which the act of Congress gave, and at the same time disregarding the essential conditions imposed by Congress upon its exercise."

This sort of property right has been valued, and been required by the courts to be valued, in numerous cases involving the valuation of public utilities even for rate-making purposes. In *San Joaquin Company* v. *Stanislaus County,* 233 U. S. 454, and *McCardle* v. *Indianapolis Water Company,* 272 U. S. 400, it was held that the value of the company's water rights should be included in the rate base, the Court saying in the latter case:

> "This right is an extraordinarily valuable part of the whole value of this property. . . . This development of its water rights, which has been accomplished by the water company at times with extreme difficulty, does actually largely increase the value of the property. . . . The value of these water rights must be included."

Doubtless Congress intended the Commission to exercise judgment and discretion in ascertaining the value of the property to be inventoried, in fact subdivision (e) provides that all rules and regulations made by the Commission "for the purpose of administering the provisions of this section" shall have the force and effect of law, but nowhere is the Commission invested with any judgment or discretion to exclude from the inventory any property owned by the carrier or to make any special or restricted valuation which has that effect. In granting a writ of mandamus to compel the Commission to consider and act in respect of each item mentioned in Section 19a this Court has referred to the language of that section as a "direct and express command," *Kansas City Southern Railway Company* v. *Inter-*

state Commerce Commission, supra. The command here is to inventory "all the property owned" by the carrier.

III

The Commission is not Authorized to Report as a "Value for Rate-Making Purposes" under Section 15a or Otherwise a Valuation Which Excludes Part of the Carrier's Property

When the *Texas Midland Railroad* report was made, July 31, 1918, the only immediate purpose for which the valuations under Section 19a could be used was in rate-making because the making of rates was the principal duty of the Commission in those days. The making of rates involves the aggregate return on the aggregate property in the territory served irrespective of ownership as between the several carriers. The important consideration is the relation which the total income produced by the rates in the territory bears to the total value of the railway property in that territory. For that purpose the Commission assumed that it made no great difference in whose inventory a right of way or a terminal was included so long as the total property used in the service was inventoried and valued somewhere. As the Commission said in the *Texas Midland Railroad* report:

> "When the valuation work has been completed for all the railroads in the United States, the Commission, the Congress, and the public will be informed with respect to every piece of property used in serving the public, with the single exception of that insignificant portion which is privately owned and partially used by common carriers. . . . All the property used in serving the public will be inventoried and valued, and will be inventoried and valued once and only once." (Decision, p. 24.)

However arbitrary its rule as to the valuation of jointly used property may have been, its refusal to assign a value

to the right of one carrier to use the property of another, whether the right of use constituted an estate therein or not, worked no practical injury to the carriers and resulted in no legal proceedings or effective protest to test its validity.

Upon the enactment of the Transportation Act, February 28, 1920 the practical situation was entirely changed. That Act, amending the Interstate Commerce Act, for the first time invested the Commission with jurisdiction over the consolidation of railroad properties, the recapture of excess earnings, the division of joint rates and the issuance of securities.

Consolidation. Section 5 requires the Commission to prepare and adopt a plan of consolidation of all the railway properties into a limited number of systems and Subdivision (6) (b) thereof provides:

> "The value of the properties sought to be consolidated shall be ascertained by the Commission under Section 19a of the Act."

Recapture. Under Subdivision (6) of Section 15a one-half of the annual net railway operating income in excess of 6% of the value of the railway property held or used by a carrier in the service of transportation is recoverable by the Commission for the purpose of establishing a general railroad contingent fund from which loans to less fortunate carriers may be made and

> "The value of such railway property shall be determined by the Commission in the manner provided in paragraph (4)."

and paragraph (4) provides that

> "Whenever pursuant to Section 19a of this Act the value of the railway property of any carrier held and used in the service of transportation has been finally

> ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value."

referring to the aggregate value of such property of the carriers "as a whole or as a whole in each of such rate groups or territories as the Commission may from time to time designate."

Division of joint rates. Issuance of securities. In addition to the above mentioned specific provisions the final valuation also becomes *prima facie* evidence for other purposes where the value of the property is involved because whenever any proceeding raising a question as to such value is initiated the provision of Subdivision (i) of Section 19a making the final valuation

> "*prima facie* evidence of the value of the property in all proceedings under the Act . . . as of the date of the fixing thereof and in all judicial proceedings for the enforcement of the Act . . . and in all judicial proceedings brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission."

is applicable. The value of the property of a carrier is involved under Subdivision (6) of Section 15 directing the Commission in prescribing the division of joint rates to give due consideration to a "fair return upon the railway property held for and used in the service of transportation" by the respective carriers. It is also involved under Subdivision (2) of Section 20a giving the Commission jurisdiction over the issuance of securities by the several carriers.

All of these purposes draw in question not the value of the property of the carriers as a whole or by groups, as in the case of rate-making, but the value of the property of each individual carrier as contrasted with the value of the property of some other carrier. The Carrier contends,

as will hereinafter more fully appear, that under the Act and the decisions of this Court the true value even for rate-making purposes is the actual fair value of the property used in the service to which the rates apply. But whatever may be said in favor of a special rate base for use in establishing rates which as between the carriers as a whole and the public will yield a fair return on the aggregate property devoted to public use, no base which excludes part of the property of any particular carrier can be used in determining its own individual rights as an owner of private property. That property owned by a railroad company does not lose the constitutional protection afforded to private property by reason of being devoted to public use has been decided many times. As was said in *Western Union Telegraph Company* v. *Pennsylvania Railroad Company*, 195 U. S. 540 at 569:

> "In *Sweet* v. *Rechel*, *Cherokee Nation* v. *Kansas Railway Co.*, and *Kohl* v. *United States*, all cited *supra*, the property to which the constitutional protection was applied was property in private use. Their doctrine applies as well to private property devoted to a public use. . . . A railroad's right of way has, therefore, the substantiality of the fee, and it is private property even to the public in all else but an interest and benefit in its uses. It cannot be invaded without guilt of trespass. It cannot be appropriated in whole or part except upon the payment of compensation. In other words, it is entitled to the protection of the Constitution, and in the precise manner in which protection is given."

Upon the enactment of these amendments specifying the particular purposes for which the valuations under Section 19a were to be used and making it essential that the full value of all the property of each individual carrier, whether physical or incorporeal, should be included in its own inventory, it became incumbent on the Commission to recon-

sider the validity and effect of its arbitrary rule for valuing jointly used property. Instead of appreciating the necessity for a modification of the rule, however, the Commission seized upon Section 15a as a justification for defining its single sum valuations under Section 19a as a "value for rate-making purposes" and continuing to exclude incorporeal property therefrom.

Subdivision (4) of Section 15a provides that

> "For the purposes of this section,"

namely the purpose of determining the "aggregate value of the railway property" of the carriers upon which they will earn an "aggregate annual net operating income equal, as near as may be, to a fair return,"—

> "such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. The Commission may utilize the results of its investigation under Section 19a of this Act, in so far as deemed by it available and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to Section 19a of this Act, the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value."

Presumably relying upon the provision directing it to

> "give due consideration to all the elements of value recognized by the law of the land for rate-making purposes,"

followed by the provision that the valuation of a carrier's property made under Section 19a shall be deemed to be the value thereof under Section 15a, the Commission in the first valuation in which it decided to report a single sum value for the entire property, *San Pedro, Los Angeles and Salt Lake Railroad Company*, 75 I. C. C. 463, 507, reported June 7, 1923, determined that Section 15a required that single sum value to be a "value for rate-making purposes". The Commission indicated in that report (p. 506) and now asserts in its brief in this case that property may have a different value for rate-making purposes than that which it has for other purposes such as consolidation, division of joint rates and the issuance of securities.

The Commission proceeded upon the theory that its duty is first to determine under Section 15a what property and what basis of valuation should be used in establishing a rate base or a "value for rate-making purposes" and to report that rate base as being the "value" under Section 19a of such of the property as is "held for and used in the service of transportation." The Carrier contends that on the contrary it is the duty of the Commission to ascertain and report under Section 19a by application of the principles of valuation set forth therein the actual fair value of all the property of each carrier and the "value" so determined of that part of its property "held for and used in the service of transportation" automatically becomes the rate base or "value for rate-making purposes" under Section 15a.

The question is of tremendous importance to the Commission and the public as well as to the carriers. The members of the Commission have been by no means unanimous in their attitude towards this question. In *Atlanta, Birmingham & Atlantic Railroad Company*, 75 I. C. C. 645 at pages 665 and 666, and *Kansas City Southern Railway Company*, 84 I. C. C. 113, at page 117, the position of the majority that the value under Section 19a must be a special "value for

rate-making purposes" is set forth at length. The position of the carriers that the Commission must accept as "value for rate-making purposes" under Section 15a the actual fair value reported under Section 19a of all the property held for common carrier purposes can hardly be expressed more effectively than in the language of Commissioner Potter who dissented in the *Kansas City Southern Railway Company* report, supra, at pages 125, 126:

> "It is not for us to determine the amount upon which carriers 'are entitled to earn a fair return'. The law does that in clear and positive manner. The amount is the 'value' of the property, nothing different and neither more nor less. We are authorized only to determine value. When we determine value, the law determines that that value shall be the amount on which the carriers are entitled to earn a return. Seemingly we violate the law when we determine an amount on which we think the carrier should be allowed to earn a fair return and then arbitrarily call that amount value."

A. *The valuation must be susceptible of use for other purposes as well as rate making*

Section 15a was not intended to bring about a narrower policy in railroad valuation than had obtained theretofore. It in no sense restricted or limited the valuations under Section 19a then in progress. On the contrary Subdivision (4) of Section 15a was a mandate to the Commission to give due consideration to "*all*" the elements of value recognized by the law of the land for rate-making purposes and was a warning to the Commission to give the "*property investment account*" only that consideration to which it was entitled under the law of the land. The Transportation Act gave the carriers as property owners a new interest

in seeing that their individual properties were assigned their full value especially in view of the recapture provisions and Congress sought to emphasize to the Commission the necessity for taking into consideration all the elements of value which had long been recognized by the law of the land.

The law of the land as laid down in the leading case of *Smyth* v. *Ames*, 169 U. S. 466, established no special or restricted value for rate-making purposes. That this Court considered the proper rate base in public utility valuations to be the actual fair value of all property used in the service is plain from the following passage at p. 546:

> "We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case."

The whole tenor of the original Valuation Act, Section 19a, discloses an effort on the part of Congress to adopt not only this general rule of valuation, but also the particular items enumerated by the Court as the proper elements for determining the actual fair value of the property. Congress left to the Commission the weight to be given each element, but it directed the Commission to consider every one of them. The first element mentioned in *Smyth* v. *Ames* is "original cost of construction" and in Subdivision (b)

(First) of Section 19a the Commission is directed to ascertain and report the "original cost to date." The second element was "amount expended in permanent improvements" and Subdivision (b) (Second) directs a separate report of "improvements." The third element was "amount and market value of its bonds and stocks" and Subdivision (b) (Fourth) requires a history showing "increases and decreases in stock, bonds or other securities." The fourth element was "present as compared with original cost of construction" and Section 19a in various instances directs the ascertainment of "reproduction cost less depreciation" and "present value." The fifth element was "earning capacity" and Subdivision (b) (Fourth) direct a report on the "net and gross earnings."

The difficulties caused by first determining an arbitrary rate base under Section 15a and then calling that the value of the property under Section 19a for purposes of consolidation, recapture, division of joint rates and the issuance of securities have been pointed out with the unfair results which flow therefrom. When, however, the actual fair value of the property is first determined under Section 19a and then used as the rate base under Section 15a all the various sections of the Act can be interpreted and administered harmoniously and fairly. Section 19a, enacted March 1, 1913, makes no mention of "value for rate-making purposes." The Commission is to find the "value" of all the property, both that held for purposes of a common carrier and that held for purposes other than those of a common carrier. By amendment enacted February 28, 1920, that value was made *prima facie* evidence in consolidation, recapture, division of joint rates and the issuance of securities, where the value of the property as between each carrier and the other carriers, their individual rights as owners of private property, are involved. As part of the same amendment Congress also enacted Section 15a directing the Commission to

> "initiate, modify, establish and adjust such rates so that carriers as a whole . . . will . . . earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation."

but Congress did not leave it to the Commission to determine in its discretion what should constitute such "aggregate value" upon which the rates were to be based, the rate base. On the contrary in Subdivision (4) Congress provided that the final valuation under Section 19a

> "shall be deemed by the Commission to be the value thereof."

The only place where Congress, either in the original act or in the amendment, makes any reference to a "value for rate-making purposes" is in the second sentence of Subdivision (4) authorizing the Commission to utilize the results of its investigation under Section 19a "insofar as deemed by it available," in other words, pending completion of the final report, and directing it to

> "give due consideration to all the elements of value recognized by the law of the land for rate-making purposes."

This sentence is the Commission's guide in establishing rates upon which the carriers will earn a fair return pending the completion of its final valuation under Section 19a. Congress intended to make clear to the Commission that the rate base to be used pending such final valuation was to be the standard rate base prescribed by the law of the land, namely, the actual fair value of the property "held for and used in the service of transportation". By so doing Congress dispensed with the necessity of changing the rates when the final valuation should be completed because the

final valuation would also be based on the actual fair value of that property. There is no reference to value "for rate-making purposes" in the third sentence of Subdivision 4 providing that the final valuation under Section 19a shall be deemed to be the value under Section 15a for the very reason that the Commission no longer needed any guide for determining the rate base because the rate base became automatically determined by the final valuation.

The value is spoken of in Section 15a as a value "for rate-making purposes" because Congress in this section was dealing with rates and in the next place only that part of the property "held for and used in the service of transportation" was involved, but under the law of the land, specifically adopted by Congress as the test, the value for rate-making purposes is the actual fair value of all the property used in the public service and a valuation which omits part of that property is not a proper rate base. In the words of Mr. Justice McReynolds speaking for the majority of the Court in a most recent valuation case, *St. Louis & O'Fallon Railway Company* v. *United States,* 279 U. S. 461, at page 484:

> "Paragraph 4, §15a, directs that in determining values of railway property for purposes of recapture the Commission 'shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes'. . . . This is an express command; and the carrier has a clear right to demand compliance therewith.
>
> "The elements of value recognized by the law of the land for rate-making purposes have been pointed out many times by this Court."

citing *Smyth* v. *Ames,* supra, and many subsequent decisions establishing the proposition that value for rate-making purposes means actual fair value of all the property used in the service. Although the decision in the *O'Fallon* case was

by a divided court there was no dissent among the justices upon this proposition as evidenced by the following passage from the dissenting opinion of Mr. Justice Brandeis at p. 505:

> "It follows, that since the Commission is required by the rule of *Smyth* v. *Ames*, re-affirmed in the *Southwestern Bell* case, to determine the rate-base under § 15a by *actual value* as distinguished from prudent investment. . . ." (Italics ours.)

In using the expression "value for rate-making purposes" Congress was merely using descriptive words to distinguish the value of that part of the property used in the service from the value of the rest of the property. It by no means intended to authorize the Commission to determine two kinds of value for the same property. It did not contemplate that the value of property can vary according to the purpose for which it is to be used. That contention has long since been disposed of as part of the "law of the land" in the *Minnesota Rate Cases*, 230 U. S. 352, 449, where the court refused to accept a valuation made "for railway purposes," Mr. Justice Hughes saying at p. 451:

> "It is urged that, in this view, the company would be bound to pay the 'railway value' of the property. But, supposing the railroad to be obliterated and the lands to be held by others, the owner of each parcel would be entitled to receive on its condemnation, its *fair market value* for all its available uses and purposes. . . . If, in the case of any such owner, his property had a peculiar value or special adaptation for railroad purposes, that would be an element to be considered. . . . But still the inquiry would be as to the fair market value of the property."

The Commission cites as authority for its proposition that value of property for rate-making purposes may differ from

its value for other purposes not only *Minnesota Rate Cases*, supra, but *Missouri Rate Cases*, 230 U. S. 474, *Galveston Electric Company* v. *Galveston*, 258 U. S. 388, 396, 397 and *St. Louis & O'Fallon Railway Company* v. *United States*, supra. Those cases do make the obvious point that in making a valuation for rate-making purposes the rates then in force are not to be considered, but there is nothing in any of those cases to indicate that the kind of property to be valued for rate-making purposes is any different from the kind to be valued for other purposes. In the *Missouri Rate Cases*, supra, local assessed valuations for tax purposes were rejected in determining the rate base, but upon the ground that there was no evidence as to how the assessed valuations were determined and not upon the ground that value for tax purposes was any different from value for rate-making purposes.

The Commission also claims that as the words "prima facie evidence" do not appear in Section 15a Congress must have intended that the valuation under Section 19a should be final when used for rate-making. From this the Commission argues that its valuations under Section 19a must necessarily be for rate-making purposes leaving the carriers an opportunity to overcome their prima facie effect for other purposes by showing that when so used they must be supplemented by other evidence. The same argument could be made in connection with the use of the valuation under Section 19a in consolidation for Section 5 merely provides that the value of the properties to be consolidated shall be ascertained under Section 19a and the Commission might equally have concluded that because the words "*prima facie* evidence" do not appear in that section its valuations under Section 19a should have been made for purposes of consolidation leaving the carrier to supplement them for other purposes. It seems unnecessary to proceed with further analysis of the Commission's argument on this point be-

cause it is quite apparent that when Congress provided in a special subdivision of Section 19a, subdivision (i), that the final valuations should be "*prima facie* evidence of the value of the property in all proceedings under the Act" they contemplated a single valuation which should be used in all such proceedings and made it *prima facie* evidence solely for the purpose of permitting the carriers to introduce evidence of errors in valuation occurring therein. By no strained construction of these provisions can it be inferred that Congress intended to permit the carriers in such proceedings to set aside the whole valuation on the ground that it was not applicable to the particular purpose for which it was being used.

The decision of the Commission in the *San Pedro, Los Angeles and Salt Lake Railroad Company* valuation, supra, in determining that by reason of Section 15a its single sum valuation under Section 19a must be a "value for rate-making purposes" eventually came before the federal courts in *Los Angeles & Salt Lake Railway Company* v. *United States,* 8 Fed. (2nd) (D. C. Cal.) 747. The court held that the valuation under Section 19a must be a value susceptible of use for any purpose and that the Commission had no authority to find that the property of a carrier has different values for different purposes. As the Court said at pp. 756, 757:

> "In no place in any of the statutes bearing upon the question do we find even an implication of any authority on the part of the Commission to find that any of the property of any common carrier used in its transportation business has two kinds of value. It is the true actual value of such property, and that only, as we think, that the statutes in question authorize and require the Interstate Commerce Commission to ascertain and fix, and that, it is obvious, it has not done.
>
> "By the well-established 'law of the land' public bodies, charged with the duty of fixing rates to be charged by corporations or individuals for the furnish-

ing of water to the public for irrigation, domestic, or other useful purposes, are required to investigate, ascertain, and determine, as a basis for the rates authorized to be charged therefor, the true actual value of the property used in such business at the time the rates are authorized to be charged. It was so decided by the Circuit Court of the United States for the Southern District of California in the case of *San Diego Land & Town Co.* v. *City of National City,* 74 Fed. 79, and *San Diego Land & Town Co.* v. *Jasper,* 110 Fed. 702, respectively affirmed by the Supreme Court of the United States in 174 U. S. 739, 19 S. Ct. 804, 43 L. Ed. 1154, and 189 U. S. 439, 23 S. Ct. 571, 47 L. Ed. 892. That remains a part of the 'law of the land'."

and at p. 757:

"Congress not only in effect approved and made applicable to the Interstate Commerce Commission that law, by in express terms declaring that the action of the said Interstate Commerce Commission, in ascertaining and fixing the value of the property of the transportation companies as a basis for the fixing of rates to be charged by them should be governed by the law of the land, but by further expressly declaring as has been seen, that the said Commission should fix its value, *not for any one particular purpose,* but its *value;* that is to say, its real value at the time of the fixing of the rates authorized to be charged for such service." (Italics ours.)

In *Kansas City Southern Railway Company* v. *United States,* 19 Fed. (2nd) (D. C. Mo.) 591, the court specifically rejected the Commission's standard method of valuing the property "for rate-making purposes," saying at p. 598:

"The final valuation by order of March 4, 1924, was fixed at $49,016,268, and such value was limited to a

> valuation 'for rate-making purposes.' The Commission had no right thus to restrict a valuation which, when finally made, was designed to become *prima facie* evidence 'in all proceedings under the Act to Regulate Commerce . . . in all judicial proceedings for the enforcement of the act . . . and in all judicial proceedings brought to enjoin, set aside or suspend in whole or in part any order of the Interstate Commerce Commission.' The congressional purpose was for an ascertainment and report on the true value of the properties of the carrier."

Both of these cases were subsequently reversed, the former in 273 U. S. 299 and the latter in 275 U. S. 500, but solely upon the ground that as the final valuation is not an "order" of the Commission within the meaning of the Urgent Deficiencies Act the courts have no jurisdiction to review it upon a bill in equity brought under the provisions thereof, a point to which more particular reference will hereinafter be made. To the same effect is the language of the Court of Appeals of the District of Columbia in the case at bar (Record p. 651):

> "It is apparent, therefore, that the establishment of a base for the fixing of rates is merely one of a number of objectives to be obtained through this valuation. Nowhere in the act is there anything that either expressly or by inference can be distorted into the limitation of this valuation for rate-making purposes. The statute on the contrary provides that it shall be a valuation of all the property of the railway company."

Section 19a contemplates but one valuation and that valuation is to be used for various purposes involving the individual properties of each carrier as against those of other carriers. There is a strong presumption that in view of

these new uses for the valuations Congress in enacting the Transportation Act did not intend to deprive the carriers of any rights they had under the Valuation Act and the law of the land to have all their properties, whether physical or incorporeal, included in the valuation. An arbitrary rule which denies to a carrier any valuation for property rights admitted in the Report to be "valuable and essential to the operation of its properties as a whole", "a valuable asset", valued by the Carrier at $55,490.531 and $17,802,000 respectively, should have been abandoned by the Commission when the individual interests of the carriers became apparent under the amendments introduced by the Transportation Act.

B. *Valuation of incorporeal property is essential even in rate making by groups*

Section 15a (2) requires the Commission to initiate, modify, establish or adjust rates

> "so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will"

earn an aggregate annual net railway operating income equal, as near as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation.

For purposes of this section the Commission, as alleged in the petition and admitted in the answer, has recognized the New England territory, which includes the entire system of the Carrier, as a separate rate group from what is known as Trunk Line territory, which includes the New York Central. The Commission has held for this purpose

> "New England should be deemed to include all points in the New England States and all points in the State of New York served directly by one or more of the follow-

ing carriers: . . . New York, New Haven and Hartford"

Eastern Class-Rate Investigation, 164 I. C. C. 314 at 405, decided May 13, 1930. Rates for New England territory, thus defined to include New York points, are based on property of New England carriers in New England and at those points. Accordingly rates to be charged by the New Haven for service into New York are required to yield a fair return on all the property of that carrier including property along its entrance into New York City. To assign any of that property to the Central would result in disparity of rates between New England and Trunk Line territory.

C. *The deduction of joint facility rents does not affect the question of valuation*

As an indirect measure of compensation to the Carrier for being deprived of any valuation on its property interest in the tracks and terminals, the Commission considers that the Carrier is adequately protected because the rent which it has to pay for the use of those tracks and terminals is deductible as an operating expense in computing its "net railway operating income" for the purpose of determining whether it is earning a fair return. In its Report the Commission says:

"The rent is chargeable to joint-facility rents, which account is described as—

'This account shall include amounts payable accrued as rent for tracks, yards, terminals, and other facilities owned or controlled by other carriers, companies or individuals, and in the joint use of which the accounting company participates.'

"This account is taken into consideration when computing the 'net railway operating income' under Section 15a of the act. In this same section it is provided that

> the final value which we find under Section 19a shall be deemed the value for the purpose of determining the aggregate value of the property. To report this property for the purpose of rate-making either as property owned and used or used but not owned by the carrier would result in a duplication." (Record, p. 66.)

Subdivision (2) of Section 15a requires the establishment of such rates that carriers as a whole or by groups will arn a "net railway operating income" equal as nearly as may be to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation and subdivision (1) defines "net railway operating income" as railway operating income

> "including in the computation thereof debits and credits arising from equipment rents and joint facility rents."

If the deduction is required, then the value placed on the property rights for which the rentals are paid should be reduced by the value of the obligation to pay them. This, however, bears only on the quantum of value to be placed on the property rights and in no sense justifies a refusal to find what that value is. That the rights are "valuable" is admitted in the report. The right to run trains over the twelve mile stretch from Woodlawn to Forty-third Street affords an entrance into the heart of New York City and the right to use the Grand Central Terminal and South Station, at the termini of what is one of the most important and intensively used passenger routes in the country, are of immense value to any railroad company far in excess of the rentals, in the case of the terminals simply a proportion of interest and the cost of maintenance, which have to be paid. That value over and above those rentals attaches to these perpetual property rights owned by the Carrier and cannot be disregarded in any determination of the actual fair value of its property. It is true that property is not to be valued "for railroad pur-

poses," that is to say, it is not to be given any different value from its actual value by reason of the fact that a railroad company may condemn it, but nevertheless if property has a special adaptability for railroad purposes that is to be taken into consideration in determining its actual value. As Mr. Justice Hughes said in the *Minnesota Rate Cases*, 230 U. S. 352, in setting aside a valuation designated as the "railway value" of the property as distinguished from its commercial value, at p. 451:

> "If, in the case of any such owner, his property had a peculiar value or special adaptation for railroad purposes, that would be an element to be considered."

The value of an easement or lease is the excess of its rental value over rentals which have to be paid therefor. A valuable leasehold is properly and frequently carried on a balance sheet as an asset and at the same time the rent is chargeable as an ordinary operating expense. No different method of accounting was contemplated under Section 15a. The Commission cannot refuse to perform its statutory duty of ascertaining and reporting the value of all the Carrier's property on the ground that the Carrier is adequately compensated therefor through the allowance of this deduction in computing its net railway operating income. Furthermore the Carrier is not thus adequately compensated for if its property interest in the tracks and terminals is "a valuable asset," as the Commission has found, it is because that property interest has a value over and above the burden of the obligation to pay the rentals. The attitude of the Commission indicates a natural tendency on its part to avoid the admittedly difficult task of ascertaining what that value is. It should also be observed that even if the allowance of the deduction of the rentals in computing net railway operating income might be considered a reasonable compensating benefit to the Carrier for purposes of recapture, it is of no benefit

whatever to the Carrier for purposes of consolidation or the issuance of securities involving as they do not the ratio of earnings to property but solely the value of the property itself.

The Carrier, however, takes issue with the contention of the Commission that the rentals paid for the tracks and terminals must be deducted as "joint facility rents" in computing "net railway operating income." Subdivision (1) of Section 15a defines "net railway operating income" to include debits and credits for "joint facility rents" but it does not define "joint facility rents." The definition of "joint facility rents" therefore lies with the Commission through its authority under subdivision (1) of Section 20 to prescribe "a uniform system of accounts, and the manner in which such accounts shall be kept." Pursuant to that authority the Commission in its classification of accounts has defined joint facility rents to include

> "amounts payable accrued as rent for tracks, yards, terminals and other facilities owned or controlled by other carriers, companies or individuals."

This definition on its face would not require the Carrier to charge to that account rentals paid for the tracks from Woodlawn to Forty-third Street or for the Grand Central Terminal for under the agreements of 1848 and 1907 neither the tracks nor the terminal are "owned or controlled" exclusively by others, though the South Station may be said to be controlled by The Boston Terminal Company. Nevertheless the Commission has construed its own definition to require all these rentals to be charged to that account for the report states in so many words

> "The rent is chargeable to joint facility rents".

The Carrier is bound to make its accounts conform to the uniform system prescribed by the Commission and it is solely for that reason that it charges these rentals to "joint

facility rents." Therefore it is within the power of the Commission itself to eliminate any duplication by so modifying its accounting rules that such rentals will no longer be chargeable to "joint facility rents."

The Commission may avoid duplication in this respect either by deducting from the value of the Carrier's rights in the tracks and terminals the value of the obligation to pay rentals therefor or by so modifying the inflexibility of its accounting rules that such rentals will no longer be chargeable to joint facility rents. Instead of adopting either of these alternatives the Commission has arbitrarily excluded from the valuation the entire property rights for which the rentals are paid. Its position is untenable.

IV

Mandamus is the Proper Remedy

The Commission is an administrative board to which Congress under Section 19a has committed the duty of investigating, ascertaining and reporting "the value of all the property owned or used by every common carrier". Congress invested the Commission with no discretion as to what part of a carrier's property should be valued, the Commission must value all of its property. If the Commission has made an erroneous valuation of that property its valuation cannot be reviewed in a mandamus proceeding, but if it has failed or refused to exercise fully the jurisdiction thus conferred upon it mandamus is the proper remedy. The Commission asserts that it did fully exercise its jurisdiction in the premises; that in so doing it had to exercise discretion in interpreting the meaning of the phrase "property owned or used"; that the Carrier has shown at the most a mere error of interpretation as distinguished from a breach of duty; and that the granting of the writ would determine a question of title between two carriers, one of which is not a party to this proceeding.

A. *The Commission has not fully exercised its jurisdiction*

The Commission did take jurisdiction over the valuation of the Carrier's property, but it did not fully exercise that jurisdiction. It made a valuation of all the physical property along the line, but not of all the property of this Carrier. It defends its position by the specious reasoning that taking all the valuations together, when completed, it will have inventoried "all the property owned or used by every common carrier". But that is not all that Congress intended the Commission to do, nor is it all that the Commission itself set out to do and purports to have done. Its order reads as follows:

> "That the following be, and it is hereby declared to be, the final valuation of the properties of The New York, New Haven and Hartford Railroad Company. . . ." (Record, p. 75.)

That valuation is incomplete. The Commission purports to have valued all the properties of this Carrier, but has not done so. That was not a mere error in determining the value of the properties which were valued, but a failure, a frank refusal, to value part of those properties at all, though finding the excluded properties to be valuable, "a valuable asset". It refused to perform its statutory duty in respect of the property in question, its jurisdiction has not been fully exercised. The remedy by mandamus is always available to compel a public officer or administrative board to exercise jurisdiction and it is no defense that the officer or board has misunderstood the law in this respect. This rule was applied to this very Commission in *Interstate Commerce Commission* v. *Humboldt Steamship Company,* 224 U. S. 474, at 484:

> "The Interstate Commerce Commission is purely an administrative body. It is true it may exercise and must exercise *quasi* judicial duties, but its functions

> are defined and, in the main, explicitly directed by the act creating it . . . It may exercise judgment and discretion, and, it may be, cannot be controlled in either. But if it absolutely refuse to act, deny its power, from a misunderstanding of the law, it cannot be said to exercise discretion."

The Commission in its Report did review the history of the Carrier's rights in the tracks and terminals, pointed out certain features such as the lack of capital investment by the New Haven and analyzed the provisions of the instruments, but it reached no conclusion as to the legal status of those rights as estates in property. Nor did the Commission decide that they were not "property", but only that being incorporeal property they would not be valued "for rate-making purposes".

B. *The Commission had no discretion in respect of its duty*

The Commission makes much of the point that in ascertaining and reporting the value of the property owned or used by the Carrier it had to interpret the phrase "property owned or used" and that its interpretation if erroneous was mere error of law. Doubtless the Commission in the performance of its duties had to interpret the language of the Act, but where the interpretation involved a determination of its duty in respect of what property should be valued its failure to interpret its duty correctly is no defense to a writ of mandamus to compel the performance of that duty. If a statute invests a public officer with discretion as to what he shall do, mandamus does not lie to compel him to exercise that discretion in a particular way. If, however, the statute, instead of investing him with discretion to determine what he shall do, directs that he shall do certain things, his erroneous interpretation of the meaning of the statute will not protect him from a writ of mandamus commanding him to perform his duty according to the true

meaning of the statute. This distinction has been laid down in the leading case of *Roberts* v. *United States,* 176 U. S. 221 at 231, cited with approval in *Wilbur* v. *Krushnic,* 280 U. S. 306, in the following apt language:

> "Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the Court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required."

The same rule applies to administrative boards as shown by the extract quoted above from *Interstate Commerce Com-*

mission v. *Humboldt Steamship Company,* supra. The Commission may be compelled by mandamus to perform its statutory duty even though its failure to do so has been based on a misinterpretation of the intention of Congress as expressed in the Act.

C. *The Commission's non-action was not an error of valuation but a breach of duty*

The gist of the Commission's argument is that the Carrier is attempting to have the Court "set aside, annul and suspend the final valuation." That is the phraseology used in the act of June 18, 1910, c. 309, 36 Stat. L. 539, creating the Commerce Court with jurisdiction in equity over "cases brought to enjoin, annul or suspend in whole or in part any order of the Interstate Commerce Commission," this jurisdiction having been later transferred to the district courts by the so-called Urgent Deficiencies Act of October 22, 1913, 38 Stat. L. 208, 219, 220, abolishing the Commerce Court. This Court has held that as a final valuation under Section 19a does not require any action by a carrier it is not an "order" within the meaning of that phraseology and therefore cannot be reviewed upon a bill in equity under the Urgent Deficiencies Act and that as it is a report of an investigation which is merely *prima facie* evidence in proceedings it cannot be reviewed under the general equity jurisdiction of the court. *United States* v. *Los Angeles & Salt Lake Railroad Company,* 273 U. S. 299. The effect of that decision is to deny to the carriers any review of *errors of valuation* made by the Commission until the Commission attempts to make use of the final valuation in some proceeding and then, as this Court said at p. 314:

> "Its conclusions, if erroneous in law, may be disregarded."

In that same case, however, this Court distinguished between an error of valuation and a *breach of duty* by the Commission, saying further at p. 310:

> "In directing the Commission to investigate the value of the property of the several carriers, Congress prescribed in detail the subjects on which findings should be made, and constituted the 'final valuations' and 'the classification thereof' *prima facie* evidence, in controversies under the Act to Regulate Commerce. Every party in interest is, therefore, entitled to have and to use this evidence; and the carrier, being a party in interest, has the remedy by mandamus to compel the Commission to make a finding on each of the subjects specifically prescribed. *Kansas City Southern Ry. Co.* v. *Interstate Commerce Commission,* 252 U. S. 178."

One subject specifically prescribed by Section 19a is the "value of all the property owned or used" by every carrier and accordingly mandamus is the remedy to compel a finding of value for *all* the property so owned or used.

In *Kansas City Southern Railway Company* v. *Interstate Commerce Commission,* 252 U. S. 178, the Commission completed a tentative valuation of the property and gave notice thereof to the carrier. The carrier thereupon filed a protest against such valuation on the ground that in making it the Commission had failed to consider and include "the present cost of condemnation and damages or of purchase in excess of such original cost or present value." The Commission decided that it would not "report the reproduction cost of such land, the present cost of acquisition and damages or of purchase in excess of present value" because of the impossibility of ascertaining the same. The carrier then brought a petition for "mandamus to compel the Commission to hear the proof and act upon it under the statute." The Commission answered that it was impossible to ascertain such values and that consequently it had refused to hear further evi-

dence and had made no report on the subject. The Supreme Court of the District of Columbia dismissed the petition without opinion and the Court of Appeals also without opinion affirmed this judgment. In reversing these judgments and directing the issuance of the writ this Court said at p. 187:

> "It is obvious from the statement we have made, as well as from the character of the remedy invoked, mandamus, that we are required to decide, not a controversy growing out of duty performed under the statute, but one solely involving an alleged refusal to discharge duties which the statute exacts. Admonishing, as this does, that the issue before us is confined to a consideration of the face of the statute and the non-action of the Commission in a matter purely ministerial, it serves also to furnish a ready solution of the question to be decided, since it brings out in bold contrast the direct and express command of the statute to the Commission, to act concerning the subject in hand, and the Commission's unequivocal refusal to obey such command.
>
> "It is true that the Commission held that its non-action was caused by the fact that the command of the statute involved a consideration by it of matters 'beyond the possibility of rational determination' and called for 'inadmissible assumptions,' and the indulging in 'impossible hypotheses' as to subjects 'incapable of rational ascertainment,' and that such conclusions were the necessary consequence of the *Minnesota Rate Cases*, 230 U. S. 352.
>
> "We are of opinion, however, that, considering the face of the statute and the reasoning of the Commission, it results that the conclusion of the Commission was erroneous, an error which was exclusively caused by a mistaken conception by the Commission of its relation to the subject, resulting in an unconscious dis-

regard on its part of the power of Congress and an unwitting assumption by the Commission of authority which it did not possess. And the significance which the Commission attributed to the ruling in the *Minnesota Rate Cases,* even upon the assumption that its view of the ruling in those cases was not a mistaken one, but illustrates in a different form the disregard of the power of Congress which we have just pointed out, since, as Congress indisputably had the authority to impose upon the Commission the duty in question, it is impossible to conceive how the *Minnesota Rate* ruling could furnish ground for refusing to carry out the commands of Congress, the cogency of which consideration is none the less manifest though it be borne in mind that the *Minnesota Rate Cases* were decided after the passage of the act in question.

"Finally, even if it be further conceded that the subject-matter of the valuations in question which the act of Congress expressly directed to be made necessarily opened a wide range of proof and called for the exercise of close scrutiny and of scrupulous analysis in its consideration and application, such assumption, we are of opinion, affords no basis for refusing to enforce the act of Congress, or what is equivalent thereto, of exerting the general power which the act of Congress gave, and at the same time disregarding the essential conditions imposed by Congress upon its exercise."

The case at bar presents the same duty "on the face of the statute," the same "non-action" by the Commission and the same defense by the Commission, namely the practical burdens which it foresees if it undertakes to perform its duty if interpreted in accordance with the Carrier's contention.

That case was identical with the instant case. The same paragraphs of the Act are involved. In that case the Com-

mission failed to obey the command of the Act contained in the *last* clause of subdivision Second quoted by the Court. In the instant case the Commission failed to obey the command of the *first* clause of subdivision Second. In that case the command was to include in its valuation and to state in detail certain kinds of value, to wit: "the present cost of condemnation and damages or of purchase in excess of such original cost or present value" of the properties of the carrier. In the instant case the command was to include in its valuation and to state in detail the value of certain kinds of property, to wit: "all lands, rights of way, and terminals owned or used for the purposes of a common carrier" of the Carrier. In that case it refused to include the kinds of values designated, in the instant case it refused to include the kinds of properties designated. In that case this Court held that such refusal was a violation of statutory duty and granted the writ of mandamus. In the instant case there was equally a violation of statutory duty. The Commission not only refused to include in its valuation or to report in detail the designated values of these "rights of way and terminals," but further refused to determine whether or not the Carrier did have an ownership in those rights of way and terminals and the reason assigned for its refusal was that it was making a special and restricted kind of valuation, a rate base, a kind of valuation which the Carrier claims the Act did not authorize.

The Commission asserts that the decision of the Court of Appeals of the District of Columbia in the case at bar is in conflict with its earlier decision in *Kansas City Southern Railway Company* v. *Interstate Commerce Commission,* 6 Fed. (2nd) 692. It is not clear to us what importance is to be attached to that point now that this case is before this Court unless it be fact that the earlier case was also brought here on certiorari, which was denied without opinion in 269 U. S. 570. Certiorari may have been denied for many reasons collateral to the issues raised here and its denial

represents no decision by this Court on the merits. As the Court of Appeals considered and distinguished its earlier decision, however, and as the distinction is perfectly sound, it seems desirable to consider the questions which were there presented.

In that case the carrier alleged that the Commission did not find "the economic or exchange value" of its property because in finding its value for rate-making purposes it *failed to give weight* to the earning power, productivity, favorable location, present value, present and prospective volume of tributary traffic, low operating costs and good will. But the report, which was made a part of the petition, stated that the Commission had, in arriving at its valuation, considered "the estimate by the carriers of the commercial or economic value of the property," and in referring to this as well as other evidence of value said: "These are checks, one upon the other. No one fact, cost study, estimate, or other factor, can be said to be necessarily controlling." The real complaint of the carrier in respect of that part of the case was not that the Commission in making its valuation for rate-making purposes had not endeavored to ascertain the economic or exchange value of the property, but that it had not accepted the carrier's estimate of that value.

Among the many points of attack made by the carrier against the valuation, however, was that the Commission had failed to find the value of the carrier's interest in the Kansas City Terminal Railway Company, the Joplin Union Depot Company and the K. C. S. Elevator Company, three entirely separate corporations. The facts as to the relations between the railroad companies and these three corporations are not stated in the opinion of the court, but they appear in the valuation report, 75 I. C. C. 223, at 234, 235. The carrier owned the capital stock of the Terminal Railway Company and of the Depot Company jointly with other carriers and owned the entire capital stock of the Elevator Company. Operating and maintenance expenses

were shared by the several carriers on a wheelage basis, the Commission in its brief says under 200 year contracts although we have not found it so stated in the report. The Commission valued their respective properties to the three corporations in their separate valuation reports, including only the capital stock in the carrier's valuation report. The relations between the carrier and the three corporations were perhaps analogous to that between the New Haven and The Boston Terminal Company, though without the important statutory provisions of the Massachusetts legislation requiring the railroad companies to use the terminal property and deeming them to be the "owners" thereof for certain purposes. They bore no resemblance whatever to the interest which the New Haven has in the tracks from Woodlawn to Forty-third Street and the Grand Central Terminal. Furthermore the report of the Commission discloses that the Commission acted on the issue of the nature of the carrier's rights and did not refuse to determine that question. For example, in respect of the Elevator Company, the report stated:

> "The property is neither owned nor used by the carrier, and for this reason has no place in the carrier's valuation."

In other words, whether the Commission was right or not, it did take action and if that action was wrong it was not a breach of duty but an error of valuation.

A casual reading of this second *Kansas City Southern* case without examining the Commission's report might give the impression that the issues were the same as those raised here, but the foregoing quotations from the report make clear the distinction between them. In that case the Commission had considered the legal status of the rights claimed by the carrier and ruled that the carrier neither owned nor used the property. If the ruling was wrong it was an error of law for the correction of which mandamus is not the

proper remedy. In the case at bar the Commission refused to decide the legal status of the carrier's rights. Nowhere in this Report did the Commission rule or say that those rights were not "property owned or used," within the meaning of the Act or otherwise. The Commission arbitrarily excluded those rights solely because it was making a valuation "for rate-making purposes."

In so doing the Commission was exercising its supposed authority to determine for itself what shall constitute the rate base instead of accepting as the rate base the actual fair value of all the common carrier property. Indeed the Commission excluded the properties in question owned and used by the Carrier, and refused to determine whether or not they were so owned, though admitting that they were "rights . . . valuable and essential to the operation of its property as a whole," a "valuable asset," for the very reason that they were not finding the actual fair value of all the common carrier property, but a different kind of value, a rate base. If that conclusion is erroneous, the error lies in the Commission's misconception of its duty under the Act, for which mandamus is the proper remedy. The one most vital question in the valuations made to date is whether the Commission is authorized to determine what shall constitute the rate base under Section 15a or is required to accept as that rate base the actual fair value, or as it is sometimes termed, the economic or exchange value, determined by the methods prescribed in Section 19a, of so much of the "property owned or used" by the carrier as is "held for and used in the service of transportation." That question was not presented in the second *Kansas City Southern* case because the terminals were not excluded on that ground, but it is presented here and it is necessarily a question of statutory duty.

The Commission alleges in its answer that the Carrier has no property interest in the tracks or terminals, but only a

license to use them. The question was presented to the Commission for decision in the valuation proceedings, but it was not decided because the Commission, misconceiving its duty as to "value for rate-making purposes," found it unnecessary to do so. The report does not show whether the Carrier has a property interest in these tracks and terminals or not and in that respect is incomplete. The Commission cannot complete its incomplete report by its answer to this petition. If the Court should hold that the Carrier had no interest in the tracks and terminals the report would still be incomplete. It is not an error of decision, but an absence of decision, of which the Carrier complains.

D. *Title of other carriers is not involved*

The argument of the Commission that the granting of the writ in this case will determine a question of title between the New Haven and the Harlem, or the Central as lessee, which is not a party to these proceedings, requires but passing reference. As already shown herein this Court is not asked to decide a question of "title to property," the title to the rights in question being admittedly in the New Haven. The pertinent statutes, agreements, leases and other documents relating thereto were introduced in evidence before the Commission and at the hearing before the Supreme Court of the District of Columbia and no question was raised as to their authenticity. The Report of the final valuation annexed to the petition shows that the Commission accepted this evidence as establishing valuable rights belonging to the New Haven and the burden of the Carrier's complaint in this proceeding is that the Commission refused to ascertain what that value was. Whether the Harlem and the Central are necessary parties depends on whether the relief prayed for if granted would affect their rights. *Waterman* v. *Canal-Louisiana Bank,* 215 U. S. 33. The Commission has already found that the New Haven has "valuable"

rights and the relief prayed for if granted will be an order directing the Commission to determine the value of those rights. That order will in no way determine or affect the title. The other carriers are strangers to this petition which involves the question of the duty of the Commission in respect of the valuation of the New Haven's rights, a question solely between the Commission and the New Haven. The New Haven was not heard when the Commission in the Central's valuation assigned the entire value of the property to that carrier, nor is the Central entitled to be heard in this proceeding where the New Haven seeks to get part of it back. If in compliance with a writ of mandamus from this court the Commission shall place a value on the Carrier's rights the Commission may also decide to revalue the terminal properties inventoried to the Central because of the fact that they are subject to those rights, but the order of this Court on this petition will not direct the Commission to do so. The Central will have full opportunity to be heard before the Commission and the courts if and when such revaluation shall be undertaken and nothing to be decided by this Court on this petition will be *res judicata* or otherwise prejudicial to the Central in any judicial proceedings it may see fit to institute.

Conclusion.

Mandamus is the proper remedy for breach of duty by the Commission, but the granting of the writ is discretionary. Before exercising its discretion the Court should be satisfied that the Carrier has valuable property rights which warrant protection by such peremptory relief. For that reason the Carrier introduced in evidence the statutes, leases and agreements upon which it claims a freehold estate, an ownership in fee in the tracks and terminals, admitted by the Commission to be "rights . . . valuable and essential to the operation of its property as a whole,"

a "valuable asset," and valued by the Carrier at the enormous sum of $55,490,531 for its rights in the New York property and $17,802,000 for its rights in the Boston property. The Court of Appeals of the District of Columbia was satisfied that the Supreme Court of the District should have granted the writ ordering the Commission to complete its Report by ascertaining and reporting the value of the Carrier's property rights in the tracks and terminals in question. The decision should be affirmed.

Respectfully submitted,

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APPENDIX

Section 19a of the Interstate Commerce Act

The material provisions of Section 19a of the Interstate Commerce Act as amended are as follows:

(a) That the Commission shall, as hereinafter provided, investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this Act. To enable the Commission to make such investigation and report, it is authorized to employ such experts and other assistants as may be neeessary. The Commission may appoint examiners who shall have power to administer oaths, examine witnesses, and take testimony. The Commission shall make an inventory which shall list the property of every common carrier subject to the provisions of this Act in detail, and show the value thereof as hereinafter provided, and shall classify the physical property, as nearly as practicable, in conformity with the classification of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission.

(b) First. In such investigation said Commission shall ascertain and report in detail as to each piece of property, other than land, owned or used by said common carrier for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reason for their differences, if any. The Commission shall in like manner ascertain and report separately other values, and elements of value, if any, of the property of such common carrier, and an analysis of the methods of valuation employed, and of the reasons for any differences between any such value and each of the foregoing cost values.

Second. Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same.

Third. Such investigation and report shall show separately the property held for purposes other than those of a common carrier, and the original cost and present value of the same, together with an analysis of the methods of valuation employed.

Fourth. In ascertaining the original cost to date of the property of such common carrier the Commission, in addition to such other elements as it may deem necessary, shall investigate and report upon the history and organization of the present and of any previous corporation operating such property; upon any increases or decreases of stocks, bonds, or other securities, in any reorganization; upon moneys received by any such corporation by reason of any issues of stocks, bonds, or other securities; upon the syndicating, banking, and other financial arrangements under which such issues were made and the expense thereof; and upon the net and gross earnings of such corporations; and shall also ascertain and report in such detail as may be determined by the Commission upon the expenditure of all moneys and the purposes for which the same were expended.

* * * * * * * *

(c) Except as herein otherwise provided, the Commission shall have power to prescribe the method of procedure to be followed in the conduct of the investigation, the form in which the results of the valuation shall be submitted, and the classification of the elements that constitute the ascertained value, and such investi-

gation shall show the value of the property of every common carrier as a whole and separately the value of its property in each of the several States and Territories and the District of Columbia, classified and in detail as herein required.

(d) Such investigation shall be commenced within sixty days after approval of this Act and shall be prosecuted with diligence and thoroughness, and the result thereof reported to Congress at the beginning of each regular session thereafter until completed.

(e) Every common carrier subject to the provisions of this Act shall furnish to the Commission or its agents from time to time and as the Commission may require maps, profiles, contracts, reports of engineers, and any other documents, records, and papers, or copies of any or all of the same, in aid of such investigation and determination of the value of the property of said common carrier, and shall grant to all agents of the Commission free access to its right of way, its property, and its accounts, records, and memoranda whenever and wherever requested by any such duly authorized agent, and every common carrier is hereby directed and required to cooperate with and aid the Commission in the work of the valuation of its property in such further particulars and to such extent as the Commission may require and direct, and all rules and regulations made by the Commission for the purpose of administering the provisions of this section and section twenty of this Act shall have the full force and effect of law. Unless otherwise ordered by the Commission, with the reasons therefor, the records and data of the Commission shall be open to the inspection and examination of the public.

(f) Upon the completion of the valuation herein provided for the Commission shall thereafter in like manner keep itself informed of all extensions and improvements or other changes in the condition and value of the

property of all common carriers, and shall ascertain the value thereof, and shall from time to time, revise and correct its valuations, showing such revision and correction classified and as a whole and separately in each of the several States and Territories and the District of Columbia, which valuations, both original and corrected, shall be tentative valuations and shall be reported to Congress at the beginning of each regular session.

* * * * * * * *

(h) Whenever the Commission shall have completed the tentative valuation of the property of any common carrier, as herein stated, and before such valuation shall become final, the Commission shall give notice by registered letter to the said carrier, the Attorney General of the United States, the governor of any State in which the property so valued is located, and to such additional parties as the Commission may prescribe, stating the valuation placed upon the several classes of property of said carrier, and shall allow thirty days in which to file a protest of the same with the Commission. If no protest is filed within thirty days, said valuation shall become final as of the date thereof.

(i) If notice of protest is filed the Commission shall fix a time for hearing the same, and shall proceed as promptly as may be to hear and consider any matter relative and material thereto which may be presented in support of any such protest so filed as aforesaid. If after hearing any protest of such tentative valuation under the provisions of this Act the Commission shall be of the opinion that its valuation should not become final, it shall make such changes as may be necessary, and shall issue an order making such corrected tentative valuation final as of the date thereof. All final valuations by the Commission and the classification

thereof shall be published and shall be prima facie evidence of the value of the property in all proceedings under the Act to regulate commerce as of the date of the fixing thereof, and in all judicial proceedings for the enforcement of the Act approved February fourth, eighteen hundred and eighty-seven, commonly known as "the Act to regulate commerce," and the various Acts amendatory thereof, and in all judicial proceedings brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission.

(j) If upon the trial of any action involving a final value fixed by the Commission, evidence shall be introduced regarding such value which is found by the court to be different from that offered upon the hearing before the Commission, or additional thereto and substantially affecting said value, the court, before proceeding to render judgment shall transmit a copy of such evidence to the Commission and shall stay further proceedings in said action for such time as the court shall determine from the date of such transmission. Upon the receipt of such evidence the Commission shall consider the same and may fix a final value different from the one fixed in the first instance, and may alter, modify, amend, or rescind any order which it has made involving said final value, and shall report its action thereof to said court within the time fixed by the court. If the Commission shall alter, modify, or amend its order, such altered, modified, or amended order shall take the place of the original order complained of and judgment shall be rendered thereon as though made by the Commission in the first instance. If the original order shall not be rescinded or changed by the Commission, judgment shall be rendered upon such original order.

Section 15a of the Interstate Commerce Act

The material provisions of Section 15a of the Interstate Commerce Act are as follows:

(1) When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices, relating thereto; the term "carrier" means a carrier by railroad or partly by railroad and partly by water, within the continental United States, subject to this Act, * * * and the term "net railway operating income" means railway operating income, including in the computation thereof debits and credits arising from equipment rents and joint facility rents.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due

consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: * * *.

(4) For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. The Commission may utilize the results of its investigation under section 19a of this Act, in so far as deemed by it available, and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to section 19a of this Act the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value.

(5) Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair re-

turn, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States.

(6) If, under the provisions of this section, any carrier receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described. * * * The value of such railway property shall be determined by the Commission in the manner provided in paragraph (4).